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NATIONWIDE INJUNCTIONS
AND FEDERAL REGULATORY
PROGRAMS

FORUM PRESENTED BY THE ADMINISTRATIVE CONFERENCE
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Wednesday, February 12, 2020

9:30 a.m.

Transcript of the forum held at the Jack Morton Auditorium, George Washington University, 805 21st Street, N.W., Washington, D.C., before Barbara Moore, Certified Realtime Reporter and Registered Merit Reporter and Notary Public of the District of Columbia and the state of Maryland and the Commonwealth of Virginia.

MODERATORS:

- ALAN B. MORRISON
- MATTHEW L. WIENER

PANELISTS:

- LOREN ALI KHAN
- THE HONORABLE RONALD A. CASS
- EMILY HAMMOND
- DAVID K. HAUSMAN
- RONALD M. LEVIN
- THE HONORABLE BETH A. WILLIAMS
- THE HONORABLE STEPHEN F. WILLIAMS

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P R O C E E D I N G S

MR. MORRISON: Good morning everyone. My name is Chris Bracey. I'm the dean of the GW Law School. I'd like to take the pleasure to welcome you to George Washington University. We are honored to host this timely forum. The practice of courts issuing nationwide injunctions has become a very hot topic fueled by their increasing use

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2 in the number of very high-profile cases.

3 We are pleased to join with the
4 Administrative Conference of the United States
5 and the Administrative Law and Regulatory
6 Practice section of the ABA to sponsor today's
7 program in which experts will be debating the
8 pros and cons of this controversial practice
9 and hopefully add some light to the heat
10 that's already been generated in recent years.

11 We have a stellar lineup today of
12 leading commentators, judges and public
13 officials eager to get to the heart of this
14 divisive issue. GW Law, I'm pleased to say,
15 is contributing two of its two finest to
16 today's discussion: Senior Associate Dean for
17 Academic Affairs, Emily Hammond, who will be
18 serving as a panelist, and Associate Dean and
19 senior fellow Alan Morrison, who will be
20 moderating this forum alongside Matthew
21 Wiener, vice chair and director of ACUS.

22 Now I would like to extend a very
23 special welcome to the Honorable Jeffrey
24 Rosen, Deputy Attorney General of the United
25 States, who will deliver opening remarks

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2 today.

3 I also want to welcome our
4 distinguished group of panelists and
5 moderators. But to introduce Jeffrey we have
6 Ronald Cass. He's a council member of ACUS,
7 the Dean Emeritus of the Boston University
8 School of Law and president of Cass &
9 Associates. Ron, please, come to the podium.

10 MR. CASS: Thank you very much.
11 Well, I promise to be short, and I think I'm
12 doing as good a job as I can. I have the
13 privilege of introducing Jeff Rosen. Jeff, in
14 addition to being a fellow lawyer and someone
15 who has a long and successful career in
16 private practice, has had a number of very
17 high-profile and distinguished positions in
18 government and in the organization that
19 recognized the issues dealing with
20 administrative law.

21 He is the former chair of the ABA
22 section on Administrative Law and Regulatory
23 Practice. He is a former public member of the
24 Administrative Conference of the United
25 States. He is a former general counsel to the

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2 Department of Transportation. He was also a
3 general counsel of the Office of Management
4 and Budget. He has been a deputy secretary of
5 the Department of Transportation, and now is
6 Deputy Attorney General of the United States.
7 Truly he is a man who has trouble holding a
8 job, but he is one of the most successful and
9 best known and most highly regarded
10 practitioners of administrative law. Please
11 welcome Jeff Rosen.

12 MR. ROSEN: Well, good morning and
13 thanks everybody for being here. Let me start
14 with thanking Dean Cass for a very kind
15 introduction. I also want to thank ACUS. I
16 want to thank GW Law and of course, the ABA
17 section of Administrative Law for inviting me
18 to speak today.

19 And, of course, I would be remiss
20 if I didn't thank Matt Wiener, who is ACUS's
21 vice chair and executive director and who was
22 also kind enough to recently speak at DOJ's
23 own summit of modernizing the Administrative
24 Procedures Act a few weeks ago.

25 Today's topic of nationwide

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2 injunctions is both important and timely.
3 Many observers have commented on this issue
4 with a focus on legal and policy concerns, and
5 you will hear from a number of them later this
6 morning, including my DOJ colleague, Beth
7 Williams.

8 But what I want to focus on is the
9 practical consequences of these injunctions:
10 inconsistencies and overreaches, both from
11 the government and the courts, that occurs
12 when a court goes beyond what is necessary for
13 complete relief to the actual parties who are
14 before it.

15 And to cut to the punch line
16 before I get to the end, it seems to me that
17 the Supreme Court is going to have to address
18 this problem, and I'll explain why.

19 So let me start by explaining what
20 gives this problem its urgency, and that is
21 the exponential increase in the issue of
22 nationwide injunctions. Though they are
23 coming from a relatively small number of
24 district judges, the volume and frequency of
25 nationwide injunctions has become fairly

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2 stunning. It's no longer a once-in-a-decade
3 thorn in the side of the Executive Branch.

4 While the Attorney General has
5 taken a principled stand against all such
6 injunctions, there is a practical difference
7 between a trickle and a tsunami. And our
8 country has crossed a new threshold where
9 nationwide injunctions have become almost a
10 routine step in a regulation or policy's life
11 cycle.

12 In the most recent example just
13 last week, a single district judge in the
14 Middle District of North Carolina enjoined
15 nationwide the U.S. Citizenship and
16 Immigration Services' unlawful presence policy
17 for the other states. Just a week ago is the
18 latest one.

19 But nationwide injunctions are a
20 relatively recent phenomenon. The first
21 in-depth academic analysis published in the
22 Harvard Law Review concluded that prior to
23 1963 there were no examples of nationwide
24 injunctions.

25 Now, even those who dispute that

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2 conclusion have pointed only to a dozen
3 potential examples from the first half of the
4 20th century, which would be in stark
5 contrast to the many, many parties of the
6 injunction against the federal government
7 during the New Deal era and subsequently.

8 In any event, whether nationwide
9 injunctions, whether from 1963 or 1939, their
10 frequency today is unprecedented. So
11 according to the Department of Justice's best
12 estimate, we counted 12 nationwide injunctions
13 that were filed against the George W. Bush
14 administration in its eight years, 12 in eight
15 years. We counted 19 nationwide injunctions
16 being issued against the Obama administration,
17 also in eight years. So that's a 58 percent
18 increase in the Obama years as the trend
19 picked up.

20 During the current administration,
21 federal courts have issued at least 55
22 nationwide injunctions in just three years.
23 That's a rate of nearly 18 nationwide
24 injunctions per year. Or to put it another
25 way, nationwide injunctions are being issued

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2 at over 12 times the rate than the Bush
3 administration. Any assertion that there have
4 been more unlawful practices to challenge is
5 belied by the Justice Department's
6 considerable success in having so many of
7 these nationwide injunctions stayed or
8 reversed on appeal. And that includes the
9 litigation over the so-called travel ban where
10 the Supreme Court ruled in the government's
11 favor and vacated the nationwide injunction.

12 Interestingly, in that case
13 Justice Thomas wrote a concurrence -- case was
14 Trump v. Hawaii -- that nationwide
15 injunctions, "Are beginning to take a toll on
16 the federal court system."

17 So what is that toll? I'm going
18 to address four real examples that will
19 illustrate some of the practical problems that
20 nationwide injunctions present.

21 So the first example that I'll
22 talk about is the cases of Care v. Trump and
23 Barr v. East State Sanctuary Covenant. The
24 cases concern the DHS rule where DHS has
25 issued an interim final rule denying asylum to

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2 aliens who did not first seek protection in a
3 third country through which they traveled and
4 where protection was available. One case was
5 filed in D.C., another in the Northern
6 District of California.

7 Interestingly, the four
8 organizations who sued in California were not
9 even subject to the rule. So here is how it
10 played out. On July 24 of 2019, the district
11 court in D.C. denied the plaintiff's motion
12 for a temporary injunction. Later the same
13 day, the district judge in San Francisco
14 issued a nationwide injunction, blocking
15 enforcement of the exact same DHS rule as to
16 anyone anywhere in the United States.

17 So what that means, at that point
18 DHS was bound in D.C. by a ruling in
19 California, even though the D.C. District
20 Court had sided with the government the very
21 same day. And put another way, litigants who
22 had lost in D.C. were awarded relief anyway by
23 a judge in a different court 3,000 miles away.

24 So the government moved for a stay
25 pending appeal in the Ninth Circuit, and the

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2 appellate panel in the Ninth Circuit stayed
3 the injunction outside of the Ninth Circuit,
4 confined it to the Ninth Circuit.

5 Government then sought a Supreme
6 Court stay of the injunction while the case
7 worked its way through those two lower courts.
8 But after briefing was complete before the
9 Supreme Court, the California district court
10 doubled down and entered an order restoring
11 the nationwide scope of the injunction.

12 So a single California District
13 judge at odds with the prior D.C. District
14 Court ruling and going beyond what the Ninth
15 Circuit had done, set a nationwide rule
16 contrary to the one the Executive Branch had
17 set. I think it's fair to say that's
18 peculiar, to say the least.

19 Fortunately at that point, the
20 Supreme Court intervened to stay the
21 nationwide injunction altogether, pending
22 eventual resolution of the case.

23 So after two months of the
24 interference with the asylum policy, the
25 preliminary injunction was removed.

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2 So that's the first example of the
3 situation of the two different district courts
4 and how that played out.

5 Let me turn to another example.

6 Litigation over policies concerning military
7 service by transgender persons and individuals
8 with a history or diagnosis of gender
9 dysphoria. In 2017, nine individuals and
10 three organizations challenged the
11 presidential memorandum on that subject in the
12 Western District of Washington. Of Washington
13 State.

14 Similar challenges were also
15 brought in the Central District of California,
16 in Maryland and D.C. I'll leave it to you or
17 others to establish why they filed in those
18 particular courts, but before long all four
19 District Courts issued nationwide injunctions.

20 After that, in February 2018
21 Secretary Mattis announced a new Department of
22 Defense policy, and the government asked that
23 the nationwide injunctions be dissolved. But
24 the District Courts in Washington, California
25 and the District of Columbia refused to

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2 dissolve the nationwide injunction. So the
3 government pursued expedited appeal in the
4 Ninth and D.C. circuits and sought Supreme
5 Court relief as well.

6 What happened then? The D.C.
7 Circuit reversed the denial of the motions to
8 dissolve, the nationwide injunction out of
9 D.C. dissolved. Then the Supreme Court
10 granted a full stay of the nationwide
11 injunctions from California and Washington
12 that had been entered in the Ninth Circuit.
13 That ended three of the four nationwide
14 injunctions.

15 For nearly a year, however, the
16 Maryland District Court declined to even rule
17 on the government's motion to dissolve the
18 nationwide injunction. Even after the
19 government had obtained relief from three
20 nationwide injunctions, the one from the
21 Maryland court remained in place.

22 So again, a district judge had in
23 effect set a national policy even after the
24 Supreme Court had lifted a similar injunction
25 elsewhere. More than a month after the

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2 Supreme Court granted its stay, and only after
3 the government sought mandamus relief from the
4 Fourth Circuit, the Maryland district court
5 finally stayed its own nationwide injunction.
6 So then more than a year after Secretary
7 Mattis announced a new policy was the defense
8 department finally able to put its policy in
9 place.

10 We talked about a third example,
11 because if those two dualing court nationwide
12 injunctions issues are not enough, the most
13 recent example of inconsistencies between
14 federal courts and different jurisdictions
15 involved what's called the public charge rule
16 that's at issue in a case called DHS v. New
17 York. So federal law and long-standing
18 federal policy provides that an alien who
19 likely to become a public charge is not
20 admissible.

21 In August of last year DHS
22 finalized a rule clarifying the definition of
23 what is a public charge. Soon thereafter
24 district courts in California and Washington
25 state issued injunctions against DHS's rule,

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2 with one of those being a nationwide
3 injunction.

4 The Ninth Circuit stepped in and
5 stayed both of those injunctions. That would
6 seem like a favorable outcome for the
7 government. But the Ninth Circuit's reversal
8 of those injunctions did not allow the DHS
9 rule to take effect because two other district
10 courts had issued nationwide injunctions:
11 one in Maryland and one in New York.

12 Shortly after that, the Fourth
13 Circuit intervened and stayed the Maryland
14 district court's injunction. So the situation
15 at that point was two Courts of Appeal had
16 lifted the lower court's injunction: Fourth
17 Circuit and the Ninth Circuit. But again, DHS
18 could not do anything because it was still an
19 outstanding nationwide injunction previously
20 entered by a district judge in New York which
21 effectively overrode the contraorders of not
22 one but two circuit Courts of Appeal: the
23 district judge in New York nationwide
24 injunction, even though the Fourth Circuit and
25 Ninth Circuit held the other way.

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2 At that point there was a request
3 for the Second Circuit to intercede, but it
4 declined and denied the government's motion to
5 stay that last nationwide injunction. So we
6 have the anomalous situation that the Ninth
7 and Fourth circuits have said that injunctions
8 were not warranted, but the court in New York
9 directed that injunctive relief nonetheless
10 would be applied in the Fourth and Ninth
11 Circuits and everywhere else.

12 So this situation necessitated
13 that DOJ seek emergency relief in the Supreme
14 Court. And just two weeks ago, January 27,
15 the Supreme Court granted a stay of the New
16 York nationwide injunction. Interestingly, a
17 concurring opinion was issued by Justice
18 Gorsuch and he aptly described this strange
19 state of affairs. He said, "A single judge in
20 New York enjoined the government from applying
21 a new definition to anyone without regard to
22 geography or participation in this or any
23 other lawsuit."

24 Letting one lower court direct
25 relief in other jurisdictions that had

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2 rejected very same relief is a strange way
3 around the legal system had the Supreme Court
4 not stepped in to fix that particular case.

5 Let me turn to the fourth and
6 final example today. I want to turn to the
7 ultimate risk of competing injunctions that
8 directs different outcomes which cannot both
9 be met.

10 The well-known DACA and DAPA cases
11 highlight this issue. DACA, which is the
12 acronym for Deferred Action for Child Arrival,
13 was an Obama administration policy that
14 allowed certain unlawful aliens who had come
15 to the United States as children to apply for
16 prosecutorial discretion from deportation.
17 When the Obama administration sought to expand
18 the DACA policy to provide the acronym named
19 DAPA, the Deferred Action for Parents of
20 Americans, Texas and 25 other states brought
21 suit in the Southern District of Texas to
22 block implementation of DAPA.

23 The Texas District Court issued a
24 nationwide preliminary injunction. It was
25 upheld by the Fifth Circuit and then affirmed

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2 by an equally divided Supreme Court. So a
3 nationwide injunction against DAPA.
4 Consistent with that ruling, in September 2017
5 the Trump administration announced that it
6 would end the original DACA policy. But then,
7 more than ten lawsuits challenged the
8 determination and sought to block the repeal.
9 So it was an injunction against the DAPA being
10 implemented. These lawsuits were to try to
11 block the repeal of a very similar policy.

12 District Courts in New York and
13 California granted nationwide preliminary
14 injunctions against the Trump administration's
15 rescission of DACA and at least the district
16 court vacated the rescission nationwide as well.
17 So three nationwide rulings.

18 But that leaves us in the peculiar
19 scenario of both the Obama and Trump
20 administrations each having been blocked by a
21 nationwide injunction, one from implementing
22 and one from repealing what were fundamentally
23 similar programs.

24 In the DACA case, after the Ninth
25 Circuit affirmed the California nationwide

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2 injunction, the Supreme Court granted review,
3 and oral argument was heard last November. So
4 we are all waiting to hear from the Supreme
5 Court.

6 Up to date, a few lower courts
7 have forced the Trump administration to spend
8 more than two years implementing nationwide a
9 discretionary enforcement policy that it had
10 repealed after the lower courts and the
11 Supreme Court had barred the Obama
12 administration from implementing a materially
13 indistinguishable discretionary enforcement
14 policy that it had wanted. So whatever you
15 think about the particular policies at issue
16 on either administration, is that how our
17 system is supposed to work?

18 As these examples illustrate, not
19 only do nationwide injunctions allow a single
20 district judge to wield a nationwide veto
21 against federal policies, but they also -- and
22 I think this is worrisome as well -- create
23 potential discord among the courts themselves.
24 Nearly one-third of the nationwide injunctions
25 issued in the last three years came from

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2 courts in California.

3 Conversely, in two-thirds of all
4 the states, no nationwide injunction was
5 issued at all. And what these examples that I
6 just discussed tell us, especially with the
7 increased frequency of district judges issuing
8 nationwide injunctions, is that the task of
9 ensuring consistency and coordination in the
10 federal court system is a big challenge that
11 is becoming a bigger challenge. Why is that?

12 Perhaps the standard concern might
13 be that of litigants forum shopping, at least
14 in part because federal courts are, I'm sure
15 everyone knows, divided into 94 judicial
16 districts, and responsibility for individual
17 cases falls on approximately 600 or so active
18 district judges and perhaps another 400 or 450
19 or so senior district judges across the
20 country.

21 Or perhaps this phenomenon is
22 connected with newer or less experienced
23 judges, as more than two-thirds of the
24 nationwide injunctions issued during the
25 current administration came from district

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2 judges appointed after January of 2019.

3 At least one Supreme Court justice
4 has focused on the forum shopping concerns.
5 Justice Gorsuch wrote in his recent
6 concurrence that I referenced in the DHS v.
7 New York case that "Because plaintiffs
8 generally are not bound by adverse decisions
9 in which they were not a party, there is a
10 new-found opportunity to shop for a friendly
11 forum to secure a win nationwide."

12 If one plaintiff loses, another
13 can try as well. But if the government loses
14 just one, the enforcement of the law is
15 brought to a screeching halt nationwide with a
16 nationwide injunction.

17 The plaintiffs, therefore, have
18 virtually unlimited bites at the apple, but
19 the government must run the table to prevail
20 at least, until or unless the Supreme Court
21 addresses the case.

22 So in wrapping up, I want to
23 suggest that this practice of judges
24 conferring legal benefits on nonparties to
25 whom other judges that denied relief and

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2 enabling transparent forum shopping for
3 nationwide wrecks of cynicism and disrespect
4 for our vital institutions of the law.

5 Now, this is not to say the
6 district courts must all agree with one
7 another all the time. That happens regularly,
8 but with lesser consequences. What I'm saying
9 is that judges should be extremely reticent
10 about, in effect, nullifying one another's
11 decisions in an asymmetric way as the
12 nationwide injunctions I've discussed are very
13 different from most legal rulings that address
14 only the parties actually before the Court.

15 And that takes me back to where I
16 started. It has become increasingly apparent,
17 in the words of Justice Gorsuch, that the
18 Supreme Court "must at some point confront
19 these important objections to the increasingly
20 widespread practice."

21 Perhaps that will happen soon. In
22 January of this year the Supreme Court
23 recently granted certiorari and in another
24 closely watched case in which a nationwide
25 injunction was issued. The case is Trump v.

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2 Pennsylvania out of the Third Circuit. There
3 the court will review the Third Circuit's
4 affirmance of a nationwide preliminary
5 injunction that blocked exemptions for
6 religious and moral objectors to the
7 contraceptive coverage mandate promulgated
8 under the Affordable Care Act.

9 In addition to addressing the
10 underlying issues, that case provides the
11 Supreme Court with a chance to confront the
12 mushrooming phenomenon of district judges
13 issuing nationwide injunctions with regard to
14 parties who are not before them.

15 So today's conference is indeed
16 timely, and I hope our next speakers and all
17 of you here today will advance instructive
18 solutions to the problems presented by
19 inconsistent and overreaching nationwide
20 injunctions which would enable our government
21 and the judiciary itself to function better.

22 Thank you everybody, and good luck
23 with the remainder of the program.

24 MR. MORRISON: Welcome, everyone.
25 I'm Alan Morrison from George Washington Law

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2 School. Matt Wiener and I are going to be the
3 moderators of the program today. I want to
4 begin by seeing if we can take what Deputy
5 Attorney General Rosen said and try to focus
6 the controversy on the challenges faced.

7 So let me just start with the
8 beginning that, let's all put ourselves in the
9 position of a district judge who has the first
10 one of these cases even knowing or not knowing
11 that there are other cases around but
12 suspecting that they are likely to occur and
13 try to think about what that judge is supposed
14 to do.

15 So for our discussion, we're
16 talking only here about cases involving the
17 federal government, not the state government.
18 We're not going to focus principally on the
19 law of standing or injunctive laws related to
20 equitable injunctive relief, and we promise
21 not to have anybody say Well, it's a uniform
22 policy, uniform law, therefore automatically
23 it ought to be applied across the country, the
24 United States.

25 We are going to assume for the

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2 purposes of these discussions today that the
3 plaintiff has standing and that the plaintiff
4 has prevailed on the merits and the judge
5 concludes that the plaintiff has prevailed on
6 the merits, because otherwise there's no
7 problem about the scope of the injunction.

8 And we're going to also assume
9 that the district judge has properly balanced
10 the other factors and the other cases that are
11 required before a preliminary injunction can
12 be made.

13 We're also going to assume that
14 although the cases that Deputy Attorney
15 General Rosen talked about were district court
16 cases, the same kind of issues can arise if
17 rules, for example, have judicial review
18 limited to the Court of Appeals. And in
19 addition, the same principles ought to apply
20 whether it's the beneficiaries of federal
21 programs, as in most of the cases he
22 mentioned, or regulated industries who also
23 seek stays of regulation and may do it in a
24 very -- a variety of different context either
25 in the district court or in the Court of

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2 Appeals, the same general principles about
3 nationwide ought not to apply to them as well.

4 So in my view -- and we'll test
5 this today with our panelists -- the question
6 is not -- should not be always nationwide or
7 never nationwide but when and under what
8 circumstances. And the public charge case
9 that the Deputy Attorney General referred to
10 is a good example. There were at least four
11 separate lawsuits brought by unrelated
12 parties, each of which had a due process right
13 to not be precluded by somebody else's
14 judgment adverse to their views. Brought them
15 in places where they claim they had standing,
16 no example of forum shopping. These were all
17 localized plaintiffs seeking nationwide
18 injunctive relief, not seeking class
19 certification for those.

20 They were -- this is a situation
21 in which only the United States government was
22 adversely affected by the rulings below. That
23 is, there were no third parties as there are
24 in other cases such as the DAPA and DACA
25 examples.

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2 And they all sought broad
3 nationwide relief in the complaint on behalf
4 of the plaintiffs claiming in part that
5 without nationwide relief they would not be
6 effective in gaining relief for them directly.

7 And so the question presented for
8 each of these district judges was to what
9 extent can we order relief beyond directly
10 protecting these plaintiffs and how would that
11 relief be affected.

12 So this program is going to be
13 divided into two parts, and let me introduce
14 the panel members. I'm sure everyone in the
15 audience can read their names on the panel
16 there. But in case you can't, let me read
17 them to you in the order in which they're
18 sitting there, and it's alphabetically and
19 their bios are in the program. We won't take
20 any time to read them.

21 We'll start with Loren AliKhan,
22 Solicitor General for the District of
23 Columbia.

24 Ronald Cass is president of Ron
25 Cass Associates, formerly Boston University

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Law School.

My colleague Emily Hammond, George Washington Law School.

David Hausman, formerly with the ACLU Immigrants Rights Project where he litigated many of these cases.

Ronald Levin from Washington University School of Law.

Honorable Beth Williams from the Department of Justice Office of Legal Policy, and the Honorable Stephen Williams from the D.C. Circuit Court of Appeals.

We're going to divide it in to parts. Matt is going to talk -- try to identify in specific ways the particular kinds of problems that the government sees and the problems that the people who are seeking injunctions see was limited for them and broad examples for the government.

And then I will come back up and moderate a discussion on the question of what remedies are possible, appropriate not simply from the Supreme Court, because the Supreme Court can only issue decisions in cases, by

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2 the way, only cases in which it upholds the
3 policy. So -- as opposed you couldn't say the
4 Supreme Court could do what it chooses to do,
5 issuing advisory opinions, but in theory it
6 has to uphold the policy and then issue an
7 opinion about the extent of the preliminary
8 injunction.

9 Matt.

10 MR. WIENER: Thank you, Alan.
11 We're going to start by asking each of our
12 panelists to offer brief introductory comments
13 and then we'll turn to a discussion which will
14 involve, among other things, my asking
15 questions but also you asking questions
16 amongst yourself. It appears as though our
17 lineup here, everybody is arranged
18 alphabetically. Why don't we start, Loren,
19 with you for your opening comment and then
20 we'll turn to Ron Cass and so forth.

21 MS. ALI KHAN: Absolutely. Thank
22 you for having me. I'm Lauren AliKhan. I
23 live here and work frequently with national
24 injunctions. We're associated with a
25 plaintiff or an advocate in most of the cases

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that are in the program.

I want to speak to the factual aspects of a nationwide injunction. For impact litigators, nationwide injunctions are a pool of meaningful relief for plaintiffs and respond to impactful situations where a large segment of the population as being harmed and it's not meaningful to proceed expeditiously class-wide litigation.

I think that there is a basis in history for nationwide injunction. Injunctions found in equity and in Missouri v. Jenkins the Supreme Court talked about how the nature and the scope of constitutional violations should dictate the nature of the remedy. So I think that there is a concrete basis in the law for nationwide injunctions.

I think also they tend to be consistent with Article 3. Judicial powers is not limited to the districts in which a particular judge sits. And, frankly, if something is unconstitutional, it seems like it should be unconstitutional everywhere. So in that way these are all consistent with the

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2 rule of law. Similarly situated individuals
3 should be treated alike.

4 I think it is also true that in
5 certain circumstances harm cannot be contained
6 geographically. I think that applies to
7 looking at air or water pollution, endangered
8 species and even something like the travel ban
9 where the plaintiffs cannot secure relief for
10 themselves in a particular geographical
11 district to resolve the problem because it's
12 across boundaries and borders.

13 I think in that way often it's
14 necessary to grant complete relief to the
15 plaintiff. I think the travel ban is a great
16 example of that where Hawaii was saying well,
17 if you're not allowing immigrants from other
18 countries to come into this country regardless
19 of where they're coming in, it's going to
20 affect our ability for our universities to
21 improve or our hospitals to get doctors. And
22 so thereby having any kind of geographic
23 constraint relief is not actually a complete
24 solution for the plaintiffs.

25 I think also it's really important

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2 for judicial economy, and especially looking
3 at the institutional litigants in the states.
4 State are harmed by federal policies in
5 similar cases. It doesn't make sense to have
6 completely different lawsuits in completely
7 different jurisdictions if you can group
8 together an efficient group for the claim.

9 So I think for institutional
10 litigants, nationwide injunctions are a way of
11 substantially seeking sufficient relief in
12 order to have an efficient system. And I
13 think this is also something that as opening
14 remarks, perhaps there's a tension between
15 having one district judge saying one thing and
16 another district judge saying another. States
17 do that all the time. I think about the
18 district cases, we had regulations upheld by
19 one district judge in the a district, struck
20 down by another.

21 The effect of breaking down a
22 district's law is the same as striking down
23 any other state law or federal law. It's easy
24 to apply, and it applies to the benefit of
25 anybody seeking to strike that law down.

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2 And so I think these concerns
3 about having tension among district courts or
4 having conflicting decisions can somewhat be
5 overblown, because that is the normal course
6 of litigation. District court judges are not
7 always going to agree, Courts of Appeal are
8 not always going to agree. Until you get to
9 the Supreme Court, you are sometimes going to
10 have a potential for differing decisions. So
11 why not if there is someone who decided that a
12 federal policy is contrary to the constitution
13 to put the brakes on it until that can be
14 decided at the Supreme Court.

15 So in that way I think that also a
16 nationwide injunction can be an important
17 check on executive action, especially at a
18 time when Congress right now is at a
19 stalemate. It would allow, I think, the
20 litigants to believe that issue would prevent
21 harms to the states, the other litigants and
22 the general populace until the issues can be
23 thoroughly vetted.

24 MR. WIENER: Ron, tell us
25 otherwise.

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2 MR. CASS: Certainly injunctions
3 are equitable relief that is traditional, and
4 it's suitable in some cases and particularly
5 suitable when you have a party before the
6 Court who seeks to have something not applied
7 to that person and not applied to people who
8 would be directly having an impact on the
9 other person.

10 But when you use a nationwide
11 injunction as a way for one district to
12 effectively set nationwide policy, not just in
13 that district and not just in effect to the
14 litigants who are in court in that district
15 but with respect to everyone nationwide
16 everywhere with respect to all sorts of
17 potential application of policy, you stop the
18 ability of the government to litigate in other
19 settings and other circumstances and other
20 courts and perhaps get the law developed over
21 time in a way that might not be the same.

22 This simple nostrum that if it's
23 unconstitutional it's unconstitutional
24 everywhere ought to be stopped doesn't make
25 sense if you have different views on what is

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2 and isn't constitutional. We have a system
3 that since 1789 in district courts and circuit
4 courts -- although not in the same form that
5 they've been in for the last century -- and a
6 Supreme Court. And the Supreme Court gets to
7 say what the law is nationwide.

8 District courts, which since the
9 beginning have been narrowly confined to the
10 jurisdiction that they represent, the
11 jurisdiction they can reach. The judges are
12 required to be residents of the district.
13 Those courts are not supposed to be setting
14 nationwide policy, and particularly not in
15 issues that are political issues where you
16 have a political fight going through Congress,
17 going through the Executive, you have a
18 resolution of that fight through the critical
19 branches, and then you have litigation over
20 it. The litigation is certainly legitimate.
21 It's certainly natural if you have a legal
22 caution of action that is appropriately before
23 the court. But it is not designed to have one
24 district judge overturn the decisions that are
25 made through the Congress and through the

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Executive Branch.

There are occasions, and let me go to one of the examples that was discussed earlier: the litigation over DACA and DAPA. If you have a state saying people are being allowed in the country, once in the country they are allowed to travel. If the government decides not to enforce the law against them and sends people out of the country who come in illegally, then I, the state of Texas will be affected. And giving the relief by allowing people to be removed from Texas alone won't be sufficient because the right to travel means people can come to Maine.

That is an understanding we can talk about. I know it's off the table today. We can talk about whether the standing of the decision was right in that case, we can talk about the extended relief, but certainly there are some cases where relief to the party in the court does require broader injunctive relief.

By and large, however, the use of these injunctions incentivizes the search for

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2 the court that is most likely to rule in the
3 way the plaintiff wants. And it also is at
4 odds with the decisions of courts in cases
5 like the Mendoza case where the Supreme Court
6 said that the usual rule of non-mutual
7 collateral estoppel does not apply.

8 MR. WIENER: Can you explain what
9 that means?

10 MR. CASS: Yes, I can. Would you
11 like me to --

12 MR. WIENER: Please.

13 MR. CASS: Mutual collateral
14 estoppel means that you and I are litigating
15 in another forum. I can't assert something
16 different than the result of our litigation,
17 and neither can you. If you go into court
18 suing someone else, you weren't party to the
19 first suit, you're not bound by that decision.

20 But the other person, if I was
21 party to the suit and you're suing me, not the
22 government, the government would normally be
23 bound and the other party would be bound.
24 It's a controversial concept in many settings.
25 The part that isn't controversial is it

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2 shouldn't apply, someone shouldn't be estopped
3 from litigating an issue if they were not
4 party in a case that resolved that issue.

5 MR. WIENER: Did you have anything
6 more? I interrupted you.

7 MR. CASS: I only have one, and
8 this is a true story, as you will see. There
9 is at the case through the entry of heaven,
10 the Pearly Gates, an incredibly long line. It
11 stretches forever. There is a doctor who's
12 been in line for days, and he sees an old
13 fellow in a district judge robe go right up to
14 the Pearly Gates and go on in. So he gets out
15 of line, he goes up to St. Peter and says,
16 "Look, I'm a doctor, I've been here for days.
17 That district court judge went right past the
18 entire line." At which point St. Peter said,
19 "That was not a federal district judge. That
20 was God. He just thinks he's a federal
21 district judge."

22 MR. WIENER: Did you get that from
23 Justice Scalia? Dean Hammond.

24 MS. HAMMOND: Thank you so much,
25 and thanks also for having me. A lot of my

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2 thoughts and my take on this draws from some
3 work that I did with my colleague where we
4 evaluated what's been happening under the
5 current presidential administration and the
6 courts. We found what we believed to be quite
7 a bit of evidence of what we call regulatory
8 slough, blatant disregard of the rules of
9 administrative law. And within that context
10 we looked then at what remedies might be
11 available to courts that remain counter on
12 this kind of thing.

13 Now, that does not lead me to say
14 that I think nationwide injunctions are always
15 good. My view is that they are an important
16 tool in the judicial toolbox. I don't have
17 quite a central a view on how a United States
18 District Court judge might approach the issue.
19 I do think this is an issue that would benefit
20 from some guidance from the Supreme Court.
21 But I would hope it would not encounter a ban
22 from the court.

23 Courts, of course, are well
24 equipped to weigh past the circumstances and
25 reach outcomes in many situations. And so I

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2 think that they might consider certain factors
3 in deciding whether to issue a nationwide
4 injunction. Again, granted that we met all
5 the parameters that Alan described.

6 First of all, if we're in a court
7 that has exclusive jurisdiction over a matter,
8 I think many of the objections to nationwide
9 injunctions could be taken off the table, at
10 least the one we're hearing today. So I do
11 want to stake that piece out for a place where
12 a lot of the concerns about conflicting
13 rulings, forum shopping are being used. I
14 think that there could be some kind of
15 extension of doctrine, a type of analysis that
16 a court could undertake in view of other
17 proceedings where we are in situations out of
18 exclusive jurisdiction.

19 A court might consider is this an
20 issue that is very factually bound, something
21 that does benefit from factual development
22 over time, or is it just a purely legal
23 question, something that doesn't necessarily
24 mean lots of percolating up through the lower
25 courts.

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2 Is this a procedural or a
3 substantive area, particularly if we're
4 talking about administrative law. One of the
5 concerns that might be at play is that if an
6 agency is failing to comply with its
7 procedural obligations in enacting a
8 particular policy point of view or policy
9 dictate. If it fails to do that, it does not
10 have the democratically -- you the legitimacy
11 that go into justifying that particular
12 regulation or order having the force of law.
13 And in that kind of situation I think that
14 it's less of a concern to an injunction.
15 Where it is a substantive matter and a close
16 call, that might be a different issue and so
17 that might factor against at least many
18 nationwide injunctions.

19 We also might consider how bad is
20 the violation. What is it and how bad is it.
21 So here we would be drawing off the Winters
22 analysis to ask is this a situation where it's
23 very clear that the government has gone far
24 beyond what the law permits or is this, in
25 fact, something that maybe is more open to

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2 debate.

3 Again, it's very clear I think, a
4 concern, to impose an issue a nationwide
5 injunction.

6 Finally, a court might also, it
7 would certainly have before it any other
8 relief that it's considering. Is this a
9 situation where attorneys fees are justified
10 under the Equal Access to Justice Act? Where
11 the government did not take a supportable
12 position in the litigation. Is this a
13 situation where the action of the government
14 is being vacated anyway? Vacation essentially
15 is an issue about injunction or at least it
16 has that effect, so that might also be
17 something that a court could consider.

18 Is this a situation where contempt
19 is at issue? Is a court actually finding that
20 contempt is justified? Again, these go to
21 sort of how bad the violation is, but it also
22 has a court looking at all of the facts and
23 circumstances including the full remedial
24 picture to determine whether a nationwide
25 injunction might be warranted.

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2 So I don't believe this is an
3 on-off issue where we should always have them
4 or always not. I do think that there are
5 principles that could be applied to bring some
6 regularity to the discussion, but I do think
7 that courts have more capability than we might
8 give them credit for to consider all of those
9 circumstances.

10 MR. WIENER: And we'll talk to
11 some of those when I turn it over to Alan.
12 David, please.

13 MR. HAUSMAN: Great, and thanks
14 for having me on the panel. It's especially
15 nice to be on the panel with Judge Williams
16 that I clerked for. But I want to put my
17 co-panelists on notice, however. Judge
18 Williams has a sly tendency to ask seemingly
19 gentle questions that are completely
20 devastating. So if I get any questions like
21 that, I want to rely on you.

22 So I'm here because I worked at
23 the ACLU on the Immigrants Rights Project for
24 a few years and helped litigate cases that
25 resulted in nationwide injunctions. And you

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2 might think that inviting an ACLU lawyer like
3 me to speak to the panel about nationwide
4 injunctions is kind of like inviting your dog
5 to speak on a panel about his favorite bone.

6 But I actually agree strongly that the
7 interesting questions here are not about
8 whether nationwide injunctions are never
9 appropriate or always appropriate but about
10 when and where they are appropriate.

11 And I think it's important to
12 think hard, especially about a couple of
13 things, about when are injunctions necessary
14 to complete relief to plaintiffs. And also on
15 whether there are other doctrines, some of
16 which Dean Hammond just mentioned that can
17 help address some of the problems that critics
18 of nationwide injunctions raise.

19 To help start the discussion, I
20 wanted to give you an example from my own
21 experience.

22 The first case that we at the ACLU
23 brought against President Trump's Muslim ban
24 was the class action, the representative
25 habeas action. As you might recall, when

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2 President Trump first signed his ban, there
3 were actually people in planes on the way from
4 the banned countries about to arrive in the
5 United States. And when they arrived, Customs
6 and Border Patrol officers were going to place
7 them back on the planes to be deported at the
8 their countries of origin regardless of
9 whether they face persecution in those
10 countries.

11 So there was extreme urgency in
12 this situation, and as a result, we filed a
13 class action 24 hours after the ban and we
14 moved to certify the class of everyone who had
15 reached a U.S. port of entry from a banned
16 country and who was likely to be deported.

17 And we moved to certify this
18 nationwide class because of the urgency of the
19 problem. There wasn't time to address the
20 problem piecemeal.

21 And to illustrate just how urgent
22 this was, we got a hearing at the district
23 court just a few hours later, and at argument
24 our co-counsel actually brought a note up to
25 counsel table to let us know that one of our

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2 class members was being placed on a plane
3 right at that moment for deportation. And we
4 let the Court know, and the Court at that
5 moment issued a nationwide injunction to
6 prevent that deportation and the others from
7 taking place.

8 And I think that really
9 illustrates how nationwide injunctions
10 sometimes are necessary to prevent imminent
11 harm. And also, as the first nationwide
12 injunction against the Trump administration, I
13 think people often think about this context
14 when they're thinking about nationwide
15 injunctions. However, this was a nationwide
16 injunction that resulted from a class action,
17 and critics of nationwide injunctions
18 typically exempt injunctions resulting from
19 class actions from their criticism. In fact,
20 they say that the problem with nationwide
21 injunctions is not the fact that they are
22 nationwide but that they stretch beyond the
23 plaintiffs in a given case.

24 So I think it's useful to think
25 hard about what exactly the relevant

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2 differences are between a nationwide
3 injunction that follows a certification of a
4 nationwide class and a nationwide injunction
5 that is issued in a case brought by an
6 individual or an organization for a stay.

7 And there are a couple of key
8 differences, I think we can identify at the
9 outset. First of all, if you bring a class
10 action and you lose, you don't get another
11 shot. You're precluded in other courts. So
12 there is less ability to forum shop.

13 And then secondly, class actions
14 has some procedures to protect absent
15 plaintiffs. So one of the things I hope we're
16 going to be talking about today is whether
17 courts could consider similar factors in
18 deciding whether to issue nationwide relief in
19 nonclass actions.

20 MR. WIENER: Thank you very much,
21 David. We have a lot of -- I'm sort of
22 looking around the audience and we have a lot
23 of people working in the administrative law
24 field. And anybody who works in the
25 administrative law field immediately says to

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2 themselves what about the Administrative
3 Procedure Act. And in particular it's
4 remedial provision Section 706, and that's one
5 of the reasons we have Ronald Levin here.
6 Ron.

7 MR. LEVIN: If that's what you
8 want, that is what I will --

9 MR. WIENER: That's what we want.

10 MR. LEVIN: That's because I wrote
11 an essay on that very subject, the regulatory
12 review in 2018. And so I thought I would take
13 my short piece here to expound on what I had
14 to say there. The tension that comes before
15 someone saying that the court shall set aside
16 agency action that's unlawful, it sounds as
17 though it compels national injunction and yet
18 that isn't necessarily true.

19 The conclusion I reached in the
20 essay is that the APA basically does not
21 contain an answer to the questions we are
22 looking at today. And that is true, I have
23 two parts to it.

24 The first is that the term "set
25 aside" is broad enough that it can authorize

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2 the nationwide injunctions in some situations.
3 When the APA was enacted, there were already
4 statutes in place to provide for regulations
5 to be nullified if a person showed they were
6 unlawful.

7 Those statutes were given
8 Congress's attention, and the Congress
9 legislated in a way that would also allow that
10 type of review to exist.

11 The second part of my argument was
12 just because the statute uses the word
13 "shall," it doesn't mean that it compels
14 set-aside relief in every case. That's
15 because the statute was subject to a
16 longstanding canon of interpretation, which in
17 various contexts was used to say that the
18 judicial review statute should not be
19 construed to foreclose the exercise of
20 equitable remedial discretion, and that
21 rationale was used, for example, in cases
22 involving remand which by definition is
23 refusing to set aside an action even though
24 it's been found to be unlawful. Courts
25 generally uphold that.

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2 So I think the APA has been proven
3 on this point, and the ultimate question is
4 what do equitable principles dictate in
5 situations of this kind.

6 And I won't try to offer a global
7 answer and one that remains with me, but I do
8 want to make a point that whatever conclusion
9 we reach should be cognizant that setting
10 regulations aside is a very basic part of my
11 regulatory practice. Across-the-board relief
12 is inherent in the process of demanding a rule
13 for better analysis, better factual
14 development, better notice and comment and
15 proceedings.

16 You really don't want a situation
17 in which four or five courts have remanded a
18 case with different instructions to the same
19 agency to look at it in a remand proceeding.
20 And also applied relief is just not a practice
21 in this type of case. You want to push a
22 regulation to either apply or not apply to the
23 agency in question. You don't want it to
24 apply to everybody except for one company that
25 wants a judicial review challenged.

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2 So I share some of the concerns
3 that have been expressed about encouraging
4 percolation and discouraging forum shopping
5 and the like, but I think we should be wary of
6 placing broad generalizations about nationwide
7 injunctions that would get in the way of
8 standards of those review practices. I think
9 they're working pretty well right now.

10 MR. WIENER: Thank you. Assistant
11 Attorney General Williams.

12 MS. WILLIAMS: Thanks very much,
13 Matt. I'd also like to thank ACUS for
14 inviting me and to Deputy Attorney General
15 Rosen for his important remarks, and he was
16 very judicious on the issue.

17 MR. WIENER: You are also.

18 MS. WILLIAMS: I am also.

19 As Matt mentioned, I'm the
20 Assistant Attorney General at the Office of
21 Legal Policy at the Department of Justice, and
22 I'm very grateful to be here to discuss the
23 Department of Justice's decision on the issue
24 of injunctions.

25 It's important I think that first

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2 to be clear that across administrations of
3 both parties the Department of Justice has
4 been very -- has taken the same position, and
5 that's whether nationwide injunctions are
6 improper.

7 The Obama administration argued
8 forcefully against them, just as the Trump
9 administration does now. Nationwide
10 injunctions are problematic because they reach
11 beyond a case for controversy that is actually
12 before the Court. The department has argued
13 that nationwide injunctions which go beyond
14 what's necessary to provide complete relief to
15 the parties in the case violate Article 3 of
16 the Constitution and exceeds time-honored
17 limitations on equitable remedies.

18 But I'd like to set the principle
19 of legal arguments aside for a minute and talk
20 about the practical implications nationwide,
21 because many proponents of nationwide
22 injunctions make a fairly utilitarian
23 argument. They say that they are justified
24 because they provide a necessary check on the
25 Executive and Legislative branches. And

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2 likely today is that if you care about
3 balanced checks on the elected branches, you
4 should oppose unlawful nationwide injunctions.
5 And therefore a few reasons for this.

6 First, nationwide injunctions
7 threaten to undermine the judiciary's role in
8 our constitutional system by depriving its
9 decisions of the public legitimacy. The
10 judicial conference has noted that deference
11 to the judgments and rulings of courts depends
12 on public confidence in the integrity and
13 independent judges. But nationwide
14 injunctions threaten this public confidence.

15 As we heard from the Deputy
16 Attorney General, clearly one-third of the
17 nationwide injunctions issued against this
18 administration has come from district courts
19 from California. This forum shopping could
20 lead the public to conclude that these
21 decisions are more political than legal, and
22 that should not be the case.

23 As Alexander Hamilton wrote in
24 1778, the complete independence of the courts
25 of justice is particularly essential in the

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2 Constitution. Put another way, judges must be
3 independent arbiters of the law and not
4 political actors.

5 But the prevalence of such
6 extraordinary remedies issued after flagrant
7 forum shopping makes it difficult to sustain
8 the public confidence on which the judicial
9 policy depends.

10 Second, nationwide injunctions are
11 a check with little balance. Consider that
12 the Constitution established only one court,
13 the Supreme Court, and it does not require
14 that we have lower federal courts at all. It
15 took legislation to establish them.

16 To quote Hamilton again, he
17 asserted that the judiciary is beyond
18 comparison, the weakest of the three
19 departments of power that can never accept
20 with success either of the other two branches.

21 Certainly the framers of the
22 Constitution in 1789 and other court
23 structuring legislation never envisioned a
24 system of over 1,000 district judges each
25 wielding a Supreme Court-like nationwide power

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2 to displace their colleagues and cancel
3 federal law and policy.

4 And I put the question to you, is
5 it an appropriate or constitutional balance of
6 the branches to have each of over 1,000
7 district judges be a complete check on the
8 president of the United States or the U.S.
9 Congress or instead the constitutional rule of
10 the Supreme Court.

11 Third, nationwide injunctions
12 spark a frenzy of litigation process that
13 deprives courts of the full opportunity to
14 explain their rulings. In our tradition,
15 judicial orders are generally written so they
16 may persuasively articulate the court's reason
17 for its ruling. This statement of reasons
18 engenders respect for the courts in their
19 decisions, and it is part of what makes them
20 such an effective check on the elective
21 branches.

22 But nationwide injunctions spark a
23 rush to and through the courthouse and to and
24 through the appellate process. Often this
25 occurs on a deficient or nonexistent record

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2 with expedited briefing and expedited
3 decision-making.

4 If the nation's most pressing
5 legal problems are narrowly decided on a rush
6 or emergency basis, a predictable consequence
7 will be a watering down of the court's ability
8 to carefully deliberate and to persuasively
9 articulate the reasons for the decisions.

10 This threatens one of the core reasons that
11 courts are an effective check in the first
12 place.

13 Finally, appropriately tailored
14 injunctions can already be an effective check
15 on the elective branches. For one thing,
16 targeted injunctions often address plaintiffs'
17 alleged injury. That's all that's needed to
18 resolve the case for controversy before the
19 court.

20 For another, they do not preclude
21 uniformity of federal law. Nationwide or
22 class-wide districts can arrive to many
23 different ends: a Supreme Court review,
24 agreement among the lower courts, class
25 certification or even the government's

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2 voluntary cessation or considered uniform
3 enforcement important for piecemeal
4 enforcement to be practical.

5 Proponents of nationwide
6 injunctions have been too concerned about the
7 immediacy and too quick to dismiss the
8 effective lawful remedies that are already
9 available.

10 In sum, I hope that our discussion
11 today will wrestle with those fundamental
12 issues. Thank you for having me.

13 MR. WIENER: Thank you. We'll now
14 turn to Judge Williams, who is also an
15 affiliate of the Administrative Conference and
16 a senior fellow, and he contributes much more
17 to the conference perhaps than the title would
18 suggest.

19 JUDGE WILLIAMS: Thank you. Thank
20 you for having me. But I want to start
21 actually by saying it's hypocritical to say
22 anything on the subject because the D.C.
23 Circuit occupies an unusual position, most
24 specifically with respect to regulations where
25 Congress gives us the exclusive jurisdiction

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2 to review them.

3 So for those by law, what the
4 panel or the circuit says, it is nationwide
5 law automatically. That could be one judge
6 because the panel might split two to one, it's
7 one judge stating law for the whole country.

8 I would say by way of qualified
9 justification for that that Congress has so
10 decreed, that makes a difference. Even where
11 Congress hasn't given us exclusive
12 jurisdiction, something very similar can
13 happen in that if a statute authorizing review
14 allows someone who is aggrieved by a ruling to
15 pick the circuit as it usually does, and it's
16 often certed in a party's home or the D.C.
17 Circuit, well, once we've held a rule
18 unlawful, obviously they're going to be --
19 they're going to come here.

20 Nonetheless, what I want to do is
21 not actually try to weigh in on the details.
22 It's obviously a complex issue. And I hope
23 that notwithstanding Alan's warning, it will
24 get solved by the Supreme Court, at least if
25 the Supreme Court will offer some illumination

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2 on it.

3 I will put the issue in broader
4 perspective, and that is to link it to what I
5 have to say is my personal deepest concern at
6 this point: our current unhealthy political
7 condition. And in talking about this, I want
8 to use the word, a time to build. This
9 strikes me as having supplied really the most
10 astute productive analyses of our condition.

11 Put most simply, this argument is
12 that we've allowed institutions to gradually
13 lose their function as bodies that form, those
14 that make it their career, their character,
15 their sense of duty, their craftsmanship and
16 increase the chances -- and thereby increase
17 the chances that the institutions will
18 function for the benefit of the whole society.

19 Instead of holding participants to
20 operate to the set of principle obligations,
21 he argues, institutions now serve as a
22 platform on which members of the institute can
23 best advocate -- and at best advocate some
24 position and at worst indulge in pure
25 self-aggrandizement.

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2 He quotes quite heavily on
3 Congress. No longer means learning by
4 practice of example how to develop and mold
5 legislation. That again is inaccurate.
6 Instead it means a platform that might lead to
7 higher office or at least a role as a frequent
8 performer on nightly news broadcasts.

9 I don't and he doesn't see this as
10 a fault of representatives or senators.
11 Polarization and other problems have
12 essentially made Congress almost nonexistent
13 as a legislative body. So it's natural that
14 the members would be drawn to other
15 activities, which at least have the appearance
16 of giving some result.

17 So where do nationwide injunctions
18 fit in? They offer an opportunity for a
19 district judge to stake out a claimed
20 admiration as a stalwart protector of the rule
21 of law and the Constitution itself. I
22 hesitate to add before proceeding that I have
23 no reason to think that any particular
24 nationwide injunction has been [inaudible], by
25 this problem. It's still a problem that

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2 people thinking about the issue should bear in
3 mind.

4 So on the one side a judge would
5 stake out a claim as an advocate of the rule
6 of law and champion of the rule of law in the
7 Constitution. What's the down side? Well, a
8 district court could be overturned by a
9 circuit court or Supreme Court. It's not a
10 big deal. With the increasing assumption that
11 the law is just politics, observers in many
12 circles will just think that the reversing
13 court was driven by politics. Politics led it
14 to disregard vital principles that move the
15 district court.

16 Let's take the Supreme Court
17 itself. There's a smack-down to injure a
18 district court's reputation or punish the
19 court for use of its position as a platform.
20 Well, in current times where the judge
21 enjoined the national government probably
22 identifies with a demographic in which the
23 administration is held in contempt, probably
24 not. The smack-down may be seen not as a
25 block on the judge's discretion but a feather

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2 in its cap.

3 I want to close by addressing the
4 question of how the development of the
5 nationwide injunction might change from
6 administration to administration.

7 As a general matter it's surely
8 pro-plaintiff and thus as far as
9 administrative law is concerned
10 anti-administration. How completely that is
11 so might turn at least in part on how judges
12 view the potential audiences they have.

13 As judges we obviously write in
14 view of the parties in view of the other
15 judges and conceivably a broader audience.

16 But anyway, the potential audience
17 can include not only the obvious ones, the
18 media, the universities, the law schools,
19 educated people generally, the whole
20 population, and all this is magnified by the
21 social media.

22 So the question in terms of the
23 appearance of this phenomenon in the future
24 administrations I think turns on how you
25 expect judges to think of all these potential

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2 audiences and how they might be seen by those
3 audiences. Thank you.

4 MR. WIENER: Thank you, Judge
5 Williams. I'm going to turn to this over to
6 Alan in about five minutes to see if he can
7 bring everybody to a consensus on what he
8 calls a solution to the nationwide injunction
9 problem. I'd like to put a few related
10 questions upon the table, which in part go to
11 the question is there a problem here to be
12 addressed.

13 One of the things that -- one of
14 the things that -- one of the things that
15 struck me in reading the materials that we put
16 out to this is that -- and as was true also I
17 think in the Deputy Attorney General's remarks
18 and in most debates about this subject is that
19 most of the cases involve immigration.

20 We now have what we know about
21 contraceptives, contraceptives. We have -- I
22 think there's a case in our material about
23 cigarettes. These are obviously visible,
24 divisive, contested political issues. Do we
25 have a national injunction problem in the laws

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2 and cases that the courts regularly hear often
3 as beyond, outside of any kind of serious
4 public scrutiny.

5 The second question -- the second
6 question I have is is this largely, insofar as
7 this is a problem, is it a district court
8 problem, is it a problem at the Court of
9 Appeals level? Now, of course there, and
10 perhaps someone wants to talk about it, we do
11 have a federal statute that provides for
12 consolidation of appeals where we have
13 multiple petitions for review challenging the
14 same order, more importantly the same ruling.

15 The third question is does this
16 perhaps one, as Ron Levin suggested but I
17 don't want to put words in his mouth, does the
18 APA in the cases, of 706 of the APA set-aside
19 provision in effect provide for a de facto
20 national injunction in particular in cases
21 where a district court judge or a Court of
22 Appeals remanded a case to an agency to
23 revisit a rule saying it's arbitrary and
24 capricious. Does anybody want to take any of
25 those questions? Ron?

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2 MR. CASS: Let me actually start
3 with the third. I generally agree with Ronald
4 Levin. I have to stop there. I generally
5 agree with Ronald Levin on the operation of
6 the APA in the sense that the set-aside
7 language in the APA is ambiguous. It was not
8 thought at the time it was enacted to mean
9 that any time any court had done anything
10 wrong with an agency action that that action
11 would be held invalid with respect to all
12 applications everywhere.

13 In fact, set aside means in a lot
14 of context simply you set that aside as
15 governing law and don't apply it in the
16 instant case. The laws that were on the table
17 using language like that at the time prior to
18 the APA's enactment largely dealt with
19 commentarial regulation, where if you set
20 aside one of the provisions in a rate
21 schedule, you set it aside for everyone
22 because it was a nondiscrimination requirement
23 with respect to commentary. You couldn't set
24 aside for all. You couldn't charge different
25 people. And laws dealing with restraint of

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2 trade. Which had a long common law area in
3 terms of what was at issue there.

4 But by and large, it was not
5 thought to mean everything was off the table
6 all the time.

7 The other thing that Ron was
8 addressing was the question of whether you
9 have something akin to a nationwide injunction
10 when you hold a rule-making or some other
11 action invalid and send it back to the agency.
12 And there a lot of the time, I should say
13 Judge Williams referred to the fact that you
14 have exclusive jurisdiction within a large
15 array of those cases. There are about 130
16 statutes that give exclusive jurisdiction to
17 the D.C. Circuit or the courts in the District
18 of Columbia. So a lot of that washes out from
19 the standpoint of what is already set aside in
20 one court.

21 MR. WIENER: Ron?

22 MR. LEVIN: I think that as I
23 stated, the APA itself doesn't dictate rules,
24 but we associate APA with a certain type of
25 cases, and it's very clear that the reason

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1
2 why, a national solution in a minimized
3 strategy because a rule in itself was being
4 implemented. And I do find there's a lot of
5 force to the arguments about percolation and
6 certain geographical conflict among courts
7 that Jeff Rosen was talking about. And so I
8 think he might want to look at measures that
9 limit the ability of one geographically
10 located to dictate policies to other ones,
11 which has fascinated some judges who are
12 ordinarily tailored geographically.

13 But I think that much of this
14 debate has been framed mistakenly by
15 jurisprudential arguments that say that the
16 judge is limited to the parties to the case.
17 And I think the reason that is not helpful in
18 my mind is that it builds upon theories that
19 are developed at a time when those policies
20 were made through adjudication. And that
21 context it would be perfectly possible to say
22 well, in adjudicated cases you can simply give
23 the adjudicated elements of the enforcement
24 target relief in his or her one case. You
25 don't need to set the whole rule aside so you

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2 can go out developing the law over time.

3 I think that's still true in areas

4 where that is the vehicle, but today so much

5 of the work the government has done through

6 rule-making and what is so typically

7 challenged, frequently challenged is

8 challenging the rule itself, not the way it's

9 been applied. You challenge the rule

10 itself --

11 MR. WIENER: Pre-enforcement

12 level.

13 MR. LEVIN: Pre-enforcement level,

14 exactly. In that type of case we should be

15 able to say to the individual parties, there's

16 so many people who are also affected by the

17 rule, should follow the scope of whatever

18 relief the court grants.

19 So I see a disconnect between the

20 practical arguments that Jeff was making that

21 relate to whether one circuit should be

22 deferred to another and the more theoretical

23 arguments like the one Beth was making that

24 sound more a limited-based party where I think

25 that's crafted.

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2 MR. WIENER: Do you see
3 instances -- are you aware of instances or
4 have a problem with instances in which
5 multiple district courts are considering the
6 propriety of a federal rule under say an
7 arbitrary and capricious standard with the
8 risk, with the result of inconsistent
9 conclusions as to whether that rule of law --

10 MR. LEVIN: You're asking me?

11 MR. WIENER: Yes. If you know.

12 MR. LEVIN: No, but I think that
13 typically these cases come up in a
14 constitutional context. We are really
15 concerned about the administrative discretion.
16 In the recent decision-making sense, you're
17 talking more about whether it is even
18 constitutional or it's legal in some pure
19 legal sense.

20 In that context it's entirely
21 possible that you can have different decisions
22 made in different circuits. My point is it's
23 just less feasible in situations where the
24 cases with reasonable process going to be
25 implicated or its procedures. There it's much

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2 more likely to get a one-to-one disposition.

3 And so the theory that you come up with should

4 broadly distinguish between those type of

5 decisions.

6 MR. WIENER: Professor Hammond.

7 MS. HAMMOND: I wanted to maybe

8 pick up your comment about the standard of

9 review that applies and also your question

10 about is this a concern beyond these very hot

11 policy or political kind of issues.

12 MR. WIENER: And I'm not intending

13 to diminish the importance of the case.

14 MS. HAMMOND: Certainly, and the

15 point that I wanted to make with respect to

16 these concepts is when we're talking about

17 related to the point of deciding of remedy, I

18 think it's important to keep in mind that

19 deference doctrines are in operation for the

20 substantive review that the Court is

21 undertaking.

22 So courts here are reinforcing the

23 article pre-norms to the extent that they are

24 not, they are trying to keep themselves from

25 substituting their own policy preferences from

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2 those of the government. And it's very hard
3 to win against an agency when those deference
4 doctrines are in operation.

5 So I do think that to the extent
6 you're talking about run-of-the-mill
7 administrative law cases where these deference
8 doctrines apply, certainly there, again,
9 that's another situation where we already have
10 built-in checks against this concern of courts
11 issuing policy, and looking at the whole case
12 again I think becomes more important.

13 MR. WIENER: That's an
14 excellent point. Judge Williams.

15 JUDGE WILLIAMS: I just wanted to
16 add something on the issue raised about a
17 nationwide regulation which is held invalid in
18 Circuit X. There is a solution which agencies
19 follow with regard to that, non-acquiescence.
20 And in deciding on that it seems like we make
21 a tradeoff between the benefits of -- the
22 choices at that point are giving up nationwide
23 or having a split regulatory system. And they
24 seem to be in a good position to make that
25 choice.

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2 I don't think it's as inherently
3 severe as it may seem. As I say, granted the
4 D.C. Circuit has taken jurisdiction for that
5 sort of choice of the agency.

6 MR. WIENER: Other panelists?
7 Ron, did you want -- the problem is here is we
8 have two Rons. Ron Cass and then Ronald
9 Levin.

10 MR. CASS: Two Rons do make a
11 right.

12 I just wanted to say with respect
13 to Judge Williams' point that normalizing the
14 ability of the government as a
15 non-acquiescence which goes along with the
16 limitations on one circuit's decision as
17 precedent for another circuit isn't affected
18 by the nationwide injunction, which is once
19 you have an injunction, then you are obligated
20 to obey the injunction and there are penalties
21 for not obeying it.

22 It may be what seems like a slight
23 difference, but if you were facing down a
24 barrel of that particular gun, the penalties
25 imposed on you as official, it makes I would

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2 think a real difference to the people who are
3 charged with enforcement.

4 MR. WIENER: Ron Levin.

5 MR. LEVIN: Well, I just got
6 another point about it. It's not a question
7 whether the rules are going to be enjoined at
8 all as opposed to simply declared to not be
9 direct in individual cases, the government
10 cannot acquiesce to that. It's perfectly
11 feasible for a matter to be played out as a
12 matter of precedent rather than a matter of
13 assumption. And that works in the context of
14 applying rules to a case. It doesn't work
15 nearly as well in the context of
16 pre-enforcement review where the actual action
17 being challenged is the rule. So if you win,
18 you win against the rule.

19 MR. WIENER: Thank you, thank you,
20 Ron. Thank you everyone. And I'm going to
21 turn it over to Alan now.

22 MR. MORRISON: I was just going to
23 ask a question about non-acquiescence. And
24 that is my understanding of non-acquiescence
25 is principally by the case of adjudication.

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2 That is tax agency, IRS, NLRB and the Social
3 Security Administration, and the
4 non-acquiescence is not a doctrine that works
5 with trying to enjoin an agency rule
6 regardless of whether it's for the
7 beneficiaries or the regulated parties. Am I
8 misunderstanding that?

9 MR. LEVIN: I thought that was
10 what I said.

11 MR. MORRISON: Well, okay. It
12 wasn't clear if it was for adjudications. It
13 could be a rule or it just be interpretation
14 of statute is the non-acquiescence.

15 JUDGE WILLIAMS: I can't recall
16 non-acquiescence with respect to the
17 invalidation of a rule. On the other hand,
18 I'm not sure if it makes that much difference,
19 because if you have an adjudication resting on
20 a principle, which one might hope it would,
21 and there's non-acquiescence in that decision,
22 or let's say there is, if there's acquiescence
23 in that decision, then this interpretation,
24 this principle that is followed by the agency
25 becomes nationwide.

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2 If there's non-acquiescence, it
3 doesn't. I'm not sure there's that much
4 difference between adjudication and
5 rule-making in this context.

6 MR. MORRISON: Ron?

7 MR. LEVIN: Well, I was thinking
8 that it can be a situation where the rule was
9 adopted, it wasn't challenged at the
10 pre-enforcement level. We argued in a
11 provisional case that the enforcement action
12 should not be upheld because the rule under
13 which it was addressed was an unlawful rule.
14 But the relief in that situation is directed
15 toward the individual. That basically was the
16 standard operating procedure prior to MLS.
17 That was -- that was the situation. It's only
18 since 1967 you can make more of a
19 pre-enforcement review, whereas we talked
20 about the rule itself.

21 MR. WIENER: Thank you.

22 MR. MORRISON: Let me say a couple
23 of words in introduction and try to get us
24 into the solution part of this discussion.

25 First I did agree with Jeff Rosen

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2 when he talked about worrying about the
3 practical consequences of all of this, both
4 from the perspective of over-deterrence and
5 overregulating and other deterrence.

6 Second, I think that one of the
7 important questions Ron Levin said, those that
8 work out over time -- Ron Cass, excuse me.
9 The question is over what period of time are
10 we talking about and what do we do in the
11 interim. Dave Hausman said before well, what
12 are we going to do about the people who are
13 about to be shipped back on the airplanes or
14 people who are being denied immediate benefits
15 of some kind or another. What do we do in the
16 interim until we have all the perfect
17 percolation.

18 And that seems to me to be a
19 problem that we all have take face. Everybody
20 is in favor of percolation getting a complete
21 record. On the other hand, when people's
22 lives or other important interests are at
23 stake or the government has important
24 interests at stake, what do we do about that
25 particular problem.

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2 One of the points that hasn't been
3 made but I want to make now is that many of
4 the actions of the Obama administration on
5 DAPA and the Trump administration were not
6 formally rules because there were exceptions
7 to the APA 553 that were considered or argued
8 to be non-rules, and so they didn't come up in
9 the rule-making context. But what we're
10 looking at is any decision of an
11 administrative agency and/or the president
12 that has the effect of applying across the
13 board to a wide range of people.

14 And in those situations, we are
15 going to have inevitably various people
16 affected in different parts of the country, in
17 similar ways but not identical. And the
18 question I want to try to deal with here is
19 what do we do about this.

20 So in the Justice Department's
21 submission to the Supreme Court in the public
22 charge case, the government suggested at the
23 end of its brief that what we need in these
24 kind of cases wouldn't be a problem under
25 Article 3 or under equitable principles if we

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2 had class actions.

3 So I want to ask you, Beth
4 Williams, tell me about, does the government
5 really want to have class actions in all these
6 cases?

7 I warned you.

8 MS. WILLIAMS: Class actions are a
9 structure that exists under the Federal Rules
10 of Civil Procedure, and I think legally they
11 solve a lot of the issues of what we're
12 talking about.

13 I think it's interesting as a
14 moment in history that a lot of -- a lot more
15 people are now standing before us in history
16 yelling Stop, and the district court judge in
17 Maryland says I'm the only person who can stop
18 it and so therefore it has to be done
19 immediately. And it's been suggested that,
20 you know, if it's really bad then therefore it
21 has to be remediated immediately.

22 Imagine this in a different
23 context. Imagine if there were a company that
24 was making faulty microwaves and the
25 microwaves were exploding in people's homes

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2 and a plaintiff went in and said This is just
3 terrible and people are in danger. Would we
4 ever say, Well, even though you have a
5 certified class, we're going to stop the
6 company nationwide, or would the Court give
7 relief to the plaintiff in the case. And are
8 you treating the government, you know,
9 substantively differently and if so, why?

10 I think we got class actions and
11 we got the protections that class actions
12 provide for a reason. You want similarly
13 situated plaintiffs to be treated similarly,
14 and you want a Court to think about that, to
15 think about numerosity and typicality and
16 commonality and the actual protections that
17 are in Rule 23.

18 So if you're throwing that aside
19 and if you're throwing aside only as to one
20 party and not to every other party in the
21 country, we should really be giving some
22 thought to whether that's appropriate.

23 MR. MORRISON: David, do you want
24 to comment on the viability of class actions?
25 Did you actually get a class certified before

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2 that order was issued?

3 MR. LEVIN: The judge actually
4 provisionally certified the class. So I
5 guess --

6 MR. MORRISON: One would ask
7 whether that would solve the problem.

8 MR. LEVIN: Correct, right. I
9 think a couple of things on class actions.
10 It's worth noting that class actions do raise
11 some of the policy problems that have been
12 mentioned. So, for example, the problem that
13 each district court can be a separate check on
14 the executive, that problem exists in class
15 actions as well. Similarly, the problem that
16 plaintiffs might rush into court and get a
17 rush judgment, that might happen in nationwide
18 class actions as well.

19 So in response to this sort of
20 hypothetical about the company, I think here
21 actually the existing standard for issuing
22 nationwide relief is actually helpful, which
23 is that it can only be issued to the extent
24 it's necessary to provide complete relief to
25 the plaintiffs in that case.

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1
2 And there are situations that are
3 really different from the company microwave
4 situation. For example, in that situation
5 where an individual plaintiff challenges a
6 religious display in a local courthouse. The
7 relief for the challenge to that display is
8 not that that display is a threat every time
9 the plaintiff comes to the courthouse, it's
10 that the display is removed from the
11 courthouse. And that's what's necessary for
12 there to be complete relief in that situation,
13 and I think the situation in the ban case was
14 very similar in that way and really isn't
15 analogous.

16 MR. MORRISON: That's because
17 people could be entering the state of
18 Washington, for example, or Hawaii or anyplace
19 in the world or even outside the Ninth
20 Circuit.

21 MR. LEVIN: Correct, and these
22 organizations could get clients from anywhere
23 as well and it would have been unworkable for
24 one organization to be able to get relief for
25 these clients.

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2 MR. MORRISON: But that kind of
3 workability and full relief doesn't
4 necessarily apply to all kinds of nationwide
5 injunctions, you say.

6 MR. LEVIN: I think it doesn't. I
7 think there are differences among the cases.

8 MR. MORRISON: That was part of
9 the point that Emily was making before.

10 Well, let me turn to another
11 question, and that is exclusive jurisdiction.
12 Should there be more exclusive jurisdiction in
13 the federal court or perhaps exclusive
14 jurisdiction if you seek a nationwide
15 injunction? That is a complaint, if you seek
16 a nationwide injunction, you have to go to a
17 particular court. District of Columbia, for
18 example. Otherwise you can get whatever
19 relief you want on a preliminary basis or
20 otherwise in your district court. Would that
21 solve the problem? Ron, do you have any
22 thoughts about that? Would you want to go
23 into that kind of system?

24 MS. ALI KHAN: I don't think to
25 the extent the problem is so large that it

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2 needs to be congressionally taken care of.
3 That is an option, that it seems to be the
4 problem that we're trying to get addressed is
5 forum shopping. And so instead of saying you
6 get have to choose where you have standing and
7 venue, you suddenly are routed directly to one
8 court but you're still getting the law of
9 whatever judge or three-panel judge in that
10 particular jurisdiction. So I don't think it
11 fixes the problem. It just narrows the
12 problem from being national to being one
13 particular judicial district.

14 MR. MORRISON: We wouldn't have
15 competing claims for nationwide injunctions
16 and plaintiffs could get injunctive relief for
17 their particular types of plaintiffs. The
18 public charge case strikes me as an example
19 where all of the harm was confined to the
20 particular physical jurisdiction, that is no
21 one can claim that people were coming in from
22 out of state to do that. Would that be -- or
23 would that not be a good idea? I'm trying to
24 find some ideas here.

25 MS. ALI KHAN: It would have to go

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2 to the same judge every time or else you're
3 going to get a possibility of different
4 injunctions from different judges in that
5 jurisdiction.

6 MR. MORRISON: Any case that's
7 filed against the travel ban, if you want a
8 nationwide injunction, you have to go to the
9 District of Columbia, let's say. Once that
10 case was filed there, all the rest of the
11 travel ban cases seeking nationwide
12 injunctions would go to that same judge. Just
13 on related cases without any special rules.

14 MS. ALI KHAN: And I think that's
15 the problem of the lack of preparation. I
16 think the cases that Jeff Rosen was talking
17 about this morning, some of the cases he was
18 highlighting, different district court judges
19 reaching different results. That's just the
20 way litigation works. The fact that we're
21 having nationwide injunctions isn't stopping
22 litigants from filing in different fora and in
23 filing the lawsuits in entirely different
24 ways.

25 The fact that we have, for

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2 example, in the public charge case, two
3 circuits going one way and a second circuit
4 going the other shows that the law is
5 developing in the way that it normally should.
6 I think if you put something in the exclusive
7 jurisdiction --

8 MR. MORRISON: That's purely a
9 tradeoff. That's purely a tradeoff. Thoughts
10 about it on jurisdiction?

11 MR. LEVIN: Well, I think it makes
12 the most sense where you have some particular
13 reason for referring out courts to other
14 courts.

15 MR. MORRISON: This is for a
16 different -- this is not subject matter. This
17 is reasons for trying to confine the problem.

18 MR. LEVIN: Let's say you don't
19 have that rationale here if your argument is
20 simply that you want only one court, you don't
21 care which. Then you have to justify picking
22 that particular court which some litigants may
23 not like very much, and it used to be that the
24 D.C. Circuit had, you know, everybody was
25 perceived to be extremely liberal and I'm sure

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2 there was a lot of complaints from the
3 conservative side, everybody is going to D.C.

4 Now, there's a system that Matt
5 mentioned where you can have multiple filings
6 and they are always consolidated in some
7 court.

8 MR. MORRISON: Circuit courts
9 only.

10 MR. LEVIN: Right, chosen
11 randomly.

12 MR. MORRISON: Exclusive, random.

13 MR. LEVIN: Right. So it would be
14 only one court, but it could be any of those
15 courts.

16 MR. MORRISON: Right. Ron?

17 MR. CASS: Well, I think
18 exclusivity certainly does solve some of the
19 problems you have with forum shopping if you
20 have the ability to choose anywhere nationwide
21 and you will have some groups going one place,
22 some groups going another place. You'll have
23 particular places that are thought to be very
24 friendly to one sort of argument and one to
25 another.

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2 But if you have a durable
3 commitment to one particular court or to one
4 set of judges, that avoids that problem. And
5 if you have a way of calling everything in one
6 court that can't be chosen by whoever is the
7 first to file, that could be another way of
8 solving the problem. It doesn't eliminate
9 every problem, but it certainly does eliminate
10 one set of problems.

11 MR. MORRISON: Do we have a
12 situation in which we really have forum
13 shopping in a particular plaintiff is going
14 around to lots of different places, or do we
15 have almost what we can call plaintiff
16 shopping, meaning that there are plaintiffs,
17 all 94 districts and an organization, for
18 example, like the ACLU could have chosen to
19 sue in almost any place because they had
20 plaintiffs? Do you see that as happening, or
21 which kind of forum shopping do you see you
22 can do?

23 MR. HAUSMAN: I thought the hard
24 questions were going to come from Judge
25 Williams.

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2 I mean, I think that in general,
3 for example, maybe an example that most of
4 you thought, in the ban case we sued where our
5 plaintiff was located where the highest was
6 located, maybe the International Aid Society.

7 MR. MORRISON: I think part of
8 problem, Ron Cass, is that we have plaintiffs
9 all over the place and where they pick
10 plaintiffs to choose in one particular forum.
11 So let me test a possibility.

12 MS. WILLIAMS: I'd just like to
13 say on that is that we don't necessarily need
14 to pick. If you're doing -- you don't need to
15 pick one forum in one place. Because what you
16 see happening is there can be ten fora or 20
17 fora, right, and if you're the plaintiffs you
18 need to stop the action. All you have to do
19 is win once. The government has to win every
20 single time.

21 MR. MORRISON: Let me follow up
22 again on that. Suppose we say no nationwide
23 injunctions. Does the government really want
24 to have, as you just said, ten or 20 of these
25 cases all around the country? Is that good

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2 for the federal judicial system? Or is there
3 some interim position we can think about?

4 MS. WILLIAMS: I think that's the
5 way the system works. I think that you have
6 equitable remedies that are appropriately
7 targeted to the plaintiff in the case. If the
8 government thinks that in that particular
9 situation uniformity of federal law is so
10 important for practical reasons, the
11 government can always decide okay, we lost in
12 one district, we're going to make a uniform
13 rule. That's up to the government's decision.

14 But if the government wants to say
15 okay, well, in this circuit we will enforce it
16 this way and in another circuit we'll enforce
17 it that way. That's also a question for the
18 elective branches.

19 MR. MORRISON: Many of these cases
20 have come up on preliminary injunctions.
21 Question is would this problem be alleviated
22 or would it be too much if, as far as
23 nationwide injunctions were concerned, they
24 were precluded absent a permanent injunction.
25 Meaning that you would have a complete record,

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2 you would have an opportunity for full
3 briefing. Would that solve any of the
4 problems?

5 MS. ALI KHAN: It certainly
6 doesn't do anything for David's client who is
7 on the plane.

8 MR. MORRISON: He can get a
9 preliminary injunction as to his. He just
10 can't get it nationwide.

11 MS. ALI KHAN: Well, I think the
12 purpose of a preliminary is to maintain the
13 status quo. The status quo is to adjudicate a
14 policy to turn over prosecutable -- the harm
15 of the government in some slight delay, it is
16 considerably less than the harm of the
17 individuals that stand to be deported,
18 whatever the issue is.

19 MR. MORRISON: I thought that the
20 preliminary was a permanent injunction.

21 MR. CASS: Certainly what the harm
22 is varies from case to case. If the
23 government is making a claim that there is a
24 threat to national security, whatever the
25 claim is, we have to evaluate that on a

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2 case-by-case basis.

3 I do think that the preliminary
4 versus permanent injunction is one line you
5 can draw, but I'm not sure it solves that
6 much. Because there are certainly cases where
7 the balance of harm is going to militate in
8 favor of a preliminary injunction. Not all
9 cases, not any case against the government.
10 But certainly there are cases where a stay of
11 something before it goes into effect has
12 relatively small cost and relatively large
13 benefit.

14 There are other cases where the
15 balance could be the opposite. I'm not sure
16 that's really going to solve that much,
17 though.

18 I do think that when you have
19 something that looks so politically salient,
20 so political tested, a lot of the problem that
21 we're seeing is the fact that the people are
22 reacting not as this is simply ordinary
23 litigation but it is litigation as a form of
24 politics. You have, you know, 20, 30, 40
25 Attorneys General from different states lining

1 PROCEEDINGS

2 up on one side of an issue and they tend to be
3 always the side that has the same politics
4 of --

5 MR. MORRISON: Are you proposing
6 to give new meaning to the political question
7 doctrine?

8 MR. CASS: I think the meaning --

9 MR. MORRISON: So the judge would
10 now say in addition to everything else, is
11 this a tough political question, in which case
12 I should do what? More, less? Nothing? Stay
13 out?

14 MR. CASS: I think that's
15 exactly --

16 MR. MORRISON: I don't disagree
17 with you that these are political questions in
18 the sense that you're using it but it's, of
19 course, true with the Obama administration,
20 the Affordable Care Act. We can imagine
21 somebody enjoining the Affordable Care Act on
22 a nationwide basis. I think that's a bad
23 idea, but we didn't worry about it when those
24 cases were going on or enjoining the EPA's
25 pollution rules on a stay, even. The Courts

1 PROCEEDINGS
2 of Appeals grant stays regularly on those kind
3 of questions.

4 MS. WILLIAMS: I understand the
5 Justice Department actually asked that the
6 Affordable Care Act not be enjoined.

7 MR. MORRISON: At this time.
8 Well, but that's different with the Justice
9 Department's position. I agree with that,
10 about that.

11 MR. LEVIN: So some of these
12 questions by the nature of the subject matter
13 are going to be politicized because there'll
14 be heavy political commitments on each side
15 who will latch on to the polarization of the
16 country and the like.

17 I think if you want to try to
18 maintain the legitimacy of the courts, you
19 want to encourage reasonable explanation of
20 why the stay was not justified. One of the
21 things that troubles me is that so many of
22 these cases culminate in one-paragraph
23 decisions on the stay. And maybe that's
24 understandable because of the emergency and
25 the like, but as you said we're enjoining and

1 PROCEEDINGS
2 opinion to follow. And so the judge or the
3 justices are expected to spell out why they
4 reached that position, that would be,
5 hopefully contribute to the legitimacy of the
6 case. It would contribute to understanding.

7 And I recognize that emergencies
8 are emergencies, but it does make a good point
9 that in that situation and the like. But if
10 you have a verbal commitment to explaining why
11 those stays were entered even if it is after a
12 delay, maybe that would tamp down --

13 MR. MORRISON: Some us were around
14 long enough to remember where it used to be
15 that the rule was to get an injunction against
16 a state statute or a federal statute, you had
17 to get a three-judge district court to do so.
18 Or the equivalent in the Court of Appeals.
19 Would that be a solution that if you wanted to
20 have a nationwide injunction or arguably even
21 a circuit-wide injunction, you had to get
22 three judges to do it other than, you know,
23 temporary restraining orders would be excluded
24 in the sense of David's case.

25 Does that idea appeal to anybody?

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2 Is that a sensible, workable dividing line,
3 because the last thing we want to do is to
4 create a rule under which there's litigation
5 over the meaning of the rule to get into the
6 nationwide injunction rather than the merits
7 or the breadth of the injunction? Thoughts?

8 MR. LEVIN: Yeah, maybe.

9 MR. MORRISON: Maybe?

10 MR. LEVIN: Yeah, I'd be remiss in
11 something like that where you would say
12 emergencies aside you can't do it on one
13 judge's say so. It would have to be approved
14 even by a convened three-judge court or by the
15 Court of Appeals.

16 MR. MORRISON: There a case would
17 go to the Court of Appeals directly that it
18 will be taken care of that way. If the case
19 is a don't go to the Court of Appeals, they
20 would have to get a three-judge court to
21 reconvene.

22 MR. CASS: My recollection is
23 pretty fuzzy on this. There were a lot of
24 pragmatic problems with the three-judge
25 district court system, which is why it went by

1 PROCEEDINGS

2 the boards eventually. And while I can't
3 recall what they were, I have an instinct that
4 we may have similar problems in this case.
5 That if you're litigating something and then
6 trying to decide on a remedy and you need a
7 three-judge District Court for a remedial part
8 of that, it may introduce another layer of
9 difficulty.

10 MR. MORRISON: One of the problems
11 was that because in essence they skipped the
12 Court of Appeals because there was no reason
13 to go to the three-court judges, there was a
14 right of appeal to the U.S. Supreme Court
15 directly, which is why so many state statutes
16 were enjoined in the late sixties and early
17 seventies and went to the Supreme Court when
18 there was no conflict among the circuits.

19 But there are some practical
20 problems. And I think what I'm trying to see
21 here is are there some -- if this problem is
22 as serious as Jeff Rosen takes it to be, then
23 we ought to be looking for a solution, none of
24 which if we're talking about here are the kind
25 of solutions that the Supreme Court could

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2 decide on a case. At least I don't think they
3 could decide on a case. Three-judge courts?
4 Anything else to be said on that?

5 So next question is is the --
6 could we do some of this by imposing a
7 heightened standard for imposing an injunction
8 either beyond the circuit or nationwide? In
9 other words, to set up a system under which
10 there would have to be a different balancing
11 of the equities, and this would also require
12 you to take into account the interest of third
13 parties besides the interest of the government
14 who might be affected.

15 So, for example, in the DACA case
16 in Texas, there were many, many individuals in
17 the United States who were seriously affected
18 by it, apart from whether the government is
19 itself writing the programs effectively and it
20 is required to take those into account or
21 similarly in the air pollution case of the
22 people who would not get the benefit of clean
23 air and our workers in an OSHA context.

24 So would that make any sense or
25 help? Beth, do you have any thoughts about

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2 that? Recognize that you can't commit the
3 Department of Justice.

4 MS. WILLIAMS: Yeah. A lot of it,
5 a lot of the proposed solutions can assume
6 that some level of nationwide injunctions are
7 okay and so they are begging to kind of I
8 think put a Band-Aid on some of the symptoms
9 of the problem. The Department of Justice's
10 position is that these any nationwide
11 injunctions are never a problem.

12 MR. MORRISON: Never a problem?

13 MS. WILLIAMS: Of course,
14 sometimes you have to give relief to the
15 party, to parties outside the case where it's
16 necessary to give complete relief to the
17 plaintiff in the case.

18 So, for example, if you're
19 desegregating a school system, you can't do it
20 just for one plaintiff. You have to do it for
21 the school system. No one disagrees that
22 sometimes relief beyond the specific party in
23 that case is necessary in order to give
24 complete relief to that plaintiff.

25 But I think there are a lot of --

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2 a lot of the proposed fixes that are different
3 than the Supreme Court just saying very
4 clearly what the law is and what the limits of
5 Article 3, the case in controversy are and
6 what the appropriate equitable remedies are,
7 anything beyond that is a symptom alleviator.

8 MR. MORRISON: We had the steel
9 seizure case, to take a wild example. Where
10 there were a couple steel companies that
11 brought suit and a number of the labor unions
12 were parties to those cases. Could they
13 enjoin the continued operation of the steel
14 mills in advance?

15 Or the census case, could we have
16 a census that was conducted one way in one
17 part of the country, another way in another
18 part of the country? Fortunately the Supreme
19 Court was able to get that case litigated by
20 the time the forums actually had to be
21 decided.

22 One of the problems is that in
23 some of these cases the orders are coming down
24 from the government -- and this is not this
25 administration only -- on the eve of a new

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2 policy being put into place so that the
3 ordinary process of litigation contemplated by
4 the APA which you got to give 30 to 60 days
5 notice, you don't even have that much in
6 advance.

7 So what do we do about it? Is it
8 clear that no place, aside from class actions,
9 that we have to have it? Would you think that
10 that would be proper, to enjoin regulations as
11 to part of the industry but not as to other
12 parts of an industry?

13 MS. ALI KHAN: I think the federal
14 government and the litigants alike have
15 similarity and conformity, but perhaps
16 imposing some kind of APA-like standard, a
17 delay in which a rule can be challenged before
18 it goes into effect, it could alleviate that
19 problem. And then you have the ultimate
20 determination.

21 I don't think the Justice
22 Department's system is no national justice
23 ever, but if the Supreme Court is the final
24 arbiter, it gets to say, you know, whether the
25 law gets to go forward or not. And that is

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2 essentially a nationwide injunction.

3 So if we have time for a case to
4 get through the system and get to a point
5 where either the government acquiesces or
6 chooses to take it up to the Supreme Court and
7 have a decision and we allow the status quo to
8 be maintained in the interim, I think that is
9 a way in which all parties would be satisfied
10 with the ultimate result.

11 Obviously that doesn't deal with
12 the emergency-type situations where the
13 government would need to put something into
14 effect for national security reasons. So it's
15 not a complete solution, but it's something
16 like public charge or census or these cases
17 that are, you know, the harms to the
18 government are considerably less than the
19 harms to the litigants, it seems like having
20 some process through which this can be vetted
21 before it goes into effect would be useful.

22 MR. MORRISON: Do you think you're
23 putting too much pressure on the Supreme
24 Court, given all these cases that are coming
25 up to decide cases too quickly, taking cases

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2 before they've even heard from the views of
3 the Courts of Appeal?

4 In steel seizure cases, for
5 example, that went through district court,
6 Court of Appeals, all of D.C. and went to the
7 Supreme Court. Same is true with other many
8 very significant cases. The Pentagon Papers
9 case, no percolation there as well.

10 So are we putting too much
11 pressure on the Supreme Court to take all
12 these cases and the path of least resistance
13 is to put on a stay without really considering
14 the merits of the case on the stay?

15 MR. CASS: Well, certainly there
16 are a lot more cases, when you have a sort of
17 trajectory that Jeff was describing in terms
18 of nationwide injunctions, there are a lot
19 more cases coming up a lot more quickly where
20 there's a nationwide injunction being put in
21 place and there is pressure to have this go up
22 to the court, because otherwise you have one
23 district court barring the implementation of
24 the policy for the entire nation.

25 And since we do have turnover in

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2 government, one of the games that is played by
3 most political parties, both sides are
4 affiliated with political parties, is if you
5 can delay something long enough you can get
6 another administration in, and then it can
7 repeal what was done.

8 So I do think that there is
9 increased pressure on the court, there is
10 increased pressure to take things quickly.
11 There is increased pressure to take them
12 without the development of the sort of record
13 you'd like to have.

14 There are some sorts of cases
15 where you want to do that anyway. It's just
16 too important not to. But I think that the
17 number of cases where the Court is under
18 pressure to take it quickly has grown very
19 substantially over the last decade.

20 MR. MORRISON: Would it be
21 ameliorative, if that's the right word, for
22 Congress to pass a statute saying district
23 courts have no authority to issue injunctions
24 beyond the circuit in which they sit? Just
25 leaving aside some seepage problems, the kind

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2 that David talked about before. Assuming that
3 they can do that, would that solve some, a
4 lot, none, most of the problem or not worth
5 doing? Any thoughts?

6 MR. CASS: Certainly solves the
7 problems. It would cause other problems. It
8 would solve some problems.

9 MR. MORRISON: That's what we're
10 trying to figure out here. Is the cure worse
11 than the problem?

12 MS. ALI KHAN: I agree with Cass.
13 It's just alleviating one symptom. So instead
14 of saying I trust the Court of Appeals
15 judges --

16 MR. MORRISON: There are at least
17 three of them. At least. The district court
18 would be able to issue an injunction, but it
19 could not extend beyond the circuit. That
20 would be the terms of the statute.

21 MR. WIENER: But we're not just
22 talking about geographic. We're not talking
23 principally about geographic limitations here.

24 MR. MORRISON: Because in a
25 rule-making context obviously it doesn't.

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2 That doesn't do much for the rule-making
3 context if it were interpreted that way.

4 MS. WILLIAMS: Also, I think Ron
5 made this point. You can't just discount
6 stare decisis. If the district court makes
7 its decision with regard to one specific
8 plaintiff and that goes up to the circuit
9 court, and the circuit court agrees with the
10 Supreme Court, that effectively is the law in
11 that circuit. It applies geographically just
12 by virtue of stare decisis.

13 So whether you, you know, you
14 actually issue injunctive relief is less
15 important because that circuit law is going to
16 control.

17 MR. MORRISON: I wasn't clear.
18 The first order regardless of the merits could
19 not extend beyond that circuit. That is the
20 government would not be bound to follow if it
21 was against the government in another circuit
22 while the case was either litigated or not
23 litigated by the circuit.

24 MR. WIENER: If it protects the
25 plaintiff, though, in that particular case,

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2 the government is obligated to do the
3 injunction throughout the world, right?

4 MR. MORRISON: As to a particular
5 plaintiff. But otherwise --

6 MR. WIENER: The geographic issue
7 per se.

8 MR. MORRISON: Right. So all
9 right. I've given all the solutions I've got
10 on my table. Does anyone else have another
11 idea for a solution?

12 JUDGE WILLIAMS: This isn't a
13 solution. I do want to question your
14 observation in the beginning that the Supreme
15 Court would then be able to address the issue
16 only in a case where it upheld the ruling on
17 the merits.

18 I don't think that's true,
19 because, I mean, you might think that where it
20 invalidated the ruling on the merits, the
21 nationwide character of the injunction issue
22 was moot. But courts don't operate that way.
23 If are there two fatal arguments, potentially
24 fatal arguments against an order, each
25 independently completely fatal, the courts,

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2 rightly or wrongly, but they do historically
3 feel free to take one, you lose on this
4 ground. Two, you lose on that ground.

5 So I don't -- it would be a
6 slightly different issue.

7 MR. MORRISON: Maybe the courts of
8 appeals do that because they are expected to
9 defend themselves against higher Supreme Court
10 rulings.

11 JUDGE WILLIAMS: We do have that
12 excuse.

13 MR. MORRISON: The second on this
14 one would be part of the rationale, the hard
15 cases on the extent of the injunctions, are
16 those cases in which the plaintiff is correct
17 on the merits. If the plaintiff is wrong on
18 the merits, it's an easy case to say no
19 nationwide injunction. Ron?

20 MR. LEVIN: So I have the same
21 reaction as Judge Williams. The cases that
22 the Supreme Court wants is the one where
23 they'd say what would happen below is just
24 outrageous, and moreover, they extend them
25 nationwide, which makes it all the worse.

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2 I don't think the Court wants to
3 take a case where yes, really this side really
4 prevails but just not as much. They don't
5 want to do that. They want to make a strong
6 statement.

7 MR. MORRISON: But in that kind of
8 a case it wouldn't answer of the harder case
9 where the plaintiff is right on the merits,
10 and then what do you do about the scope of the
11 injunction in that case, that's what I
12 consider the hard cases. It's easy if the
13 plaintiff is not right on the merits. That's
14 an easy case to say you should obviously not
15 issue any injunction, let alone a nationwide.

16 MR. LEVIN: But I think that the
17 solutions here may be structural in the way we
18 talked about in the earlier discussion. With
19 regard to that final, I would picture the
20 Court writing an opinion that probably is easy
21 because then you can get at least five to
22 sign. But it has vague dicta which then gives
23 some guidance to the lower courts where they
24 say, well, this case is not as bad as that
25 one, so we don't need to follow it, or this

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2 case is so much like the other one we really
3 have to follow it. That's not exactly how it
4 works.

5 MS. WILLIAMS: I agree with Ron
6 there. The plaintiff is right on the merits,
7 the Supreme Court is right on the statute,
8 it's going to apply not as to that plaintiff
9 but everybody else. I mean, that's the way
10 the Supreme Court functions as a matter of
11 course. I think the situation which arises is
12 where the plaintiff is egregiously wrong on
13 the merits and the Court is just completely
14 floored that this has been a Rule 10 that --

15 MR. MORRISON: So we have
16 generally not been talking about the
17 challenges to statutes. It's a different
18 problem. But some of these cases are
19 strictly, as I would say procedural, to follow
20 notice and comment. Some are arbitrary and
21 capricious. Some of them violate the statute
22 and you infringe on the First Amendment rights
23 of somebody.

24 So these are all kind of mixed
25 cases that it's hard to separate them out on

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2 subject matter because often certainly the
3 plaintiff tends to, alleges many different
4 violations.

5 Does anybody have anything else
6 they want to say, because I'd like to throw
7 some at the audience. Does the audience have
8 comments, suggestions that they would like to
9 ask? I don't think we have a microphone, but
10 that shouldn't stop anybody in this room.

11 Come up forward to the front here
12 and pose the question. Do we have a
13 microphone? Great. Great. Just please give
14 us your name and your affiliation of some
15 kind.

16 AUDIENCE MEMBER: Good morning,
17 I'm Jill Laraby and I'm a regulatory attorney
18 in the aviation sphere. I was just curious
19 your thoughts on the use of self-executing
20 language in response to delay of the APA.
21 Sometimes taking it four to five years. Is
22 that too tough of a question? The use of
23 self-regulated language by Congress. Congress
24 has passed a statute, the agency has taken
25 four to five years to implement that under the

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2 APA under a rule-making in response to
3 Congress enacted a subsequent statute that
4 says if you weren't clear the first time we'll
5 be even clearer and say we're going to --

6 MR. MORRISON: Somebody is
7 bringing an action to require the agency to do
8 something?

9 AUDIENCE MEMBER: Correct. I'm
10 just curious your thought on the use of
11 self-executing language to bypass the entire
12 Administrative Procedures Act.

13 MR. MORRISON: Seems a little
14 off-target. It's not a nationwide injunction.
15 If any court orders them to do it, they'll
16 have to do it for everybody.

17 MS. WILLIAMS: I mean, look, it's
18 a statute and you've got far fewer -- you
19 won't have any APA challenges. There's no
20 plaintiffs challenging on the APA because
21 they're going through the regulations all the
22 time.

23 So I guess I don't know how it
24 would impact nationwide injunctions, but I
25 think the same concerns about nationwide

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2 injunctions would apply to the statutes as
3 applies to the regulations.

4 MR. LEVIN: If the issue is delay,
5 so you might have the agency that is perceived
6 to be dragging its feet, and so people bring
7 suit in a variety of forums. There you do
8 potentially have the -- the most impatient
9 judge will control all the others.

10 AUDIENCE MEMBER: I have a
11 question. You had a procedure where
12 plaintiffs could litigate in multiple fora,
13 but the decision for preliminary injunctive
14 relief would be assigned to the JPNL through
15 another process, one particular court. Would
16 that allow for percolation but also sort of
17 address the question of --

18 MR. MORRISON: So I take it you're
19 thinking about the multi-district litigation
20 panel?

21 AUDIENCE MEMBER: Right.

22 MR. MORRISON: That typically
23 involves situations in which there are
24 multiple actions filed, not two or three or
25 four, as we have here. And the current

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2 procedure requires that applications be made
3 to that court and then they hold a hearing to
4 decide whether they're going to take it or
5 often they don't take it the first time and
6 then they send to it another court.

7 That's going to be rather
8 difficult to implement on that current basis
9 for dealing with problems that require
10 preliminary injunctions or at least --

11 MR. WIENER: Also as I understand
12 with the district court, the MDL, it only
13 deals with pretrial proceedings. Pretrial
14 judgment proceedings.

15 MR. MORRISON: Yes. They could
16 issue a preliminary injunction, but they
17 couldn't issue a final judgment if they can't
18 go to trial. In the sense of sending these to
19 a forum that would send it out to one person,
20 one judge to deal --

21 AUDIENCE MEMBER: Or it could be a
22 three-judge panel.

23 MR. MORRISON: Yes. That's kind
24 of how we would get to the three-judge panel.
25 Yeah.

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2 AUDIENCE MEMBER: You touched on
3 some of these issues, but it seems to me that
4 at the core of this is a real constitutional
5 question. And that the judge -- the judicial
6 branch is being forced into this, I guess,
7 position at least in some cases. If you don't
8 believe it's happening now, it could in the
9 future by congressional inaction and by
10 executive overreach and illegality.

11 So assuming you think that there
12 is a problem, it seems that we here are only
13 discussing potential solutions within the
14 judicial branch. Does the panel think it's
15 only appropriate to be discussing judicial
16 solutions, or are there potential executive
17 and legislative branch solutions that we
18 should be looking at?

19 MR. MORRISON: Thank you for the
20 question. I hoped I was clear. Almost
21 everything I've suggested here would require
22 Congress to do something. Maybe the Supreme
23 Court could impose a higher standard for
24 preliminary injunctions nationwide as
25 different balancing of factors, but otherwise

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2 I think most of the rest of these things could
3 not be -- the Supreme Court could simply say
4 no, we can have class actions, but some of the
5 other solutions that we talked about here
6 would require Congress.

7 AUDIENCE MEMBER: Sure, I totally
8 understood, but I guess my question was should
9 the solutions be oriented toward changes to
10 the Executive branch, to the Congressional
11 branch instead of congressional solutions that
12 affect the Judicial branch?

13 MR. LEVIN: Congress could resolve
14 more questions, and the executive should not
15 abuse his authority.

16 AUDIENCE MEMBER: Right. And so
17 then the judicial branch is now --

18 MR. LEVIN: Because --

19 MR. CASS: Then what happens to
20 lawyers in law school?

21 MR. WIENER: Did you have any
22 specific things in mind?

23 AUDIENCE MEMBER: Yeah. I mean, I
24 think that there could be some potential
25 creative solutions around whether the

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2 Executive branch, what powers the Executive
3 branch can use when maybe more APA process,
4 you know. I mean, I think we're being forced
5 to look at new ways that the balance of powers
6 is potentially being abused and/or there's a
7 lot of tension there.

8 So I think, you know, we're trying
9 to look for a judicial solution, but it seems
10 to be far too narrow a solution.

11 MR. CASS: I think in part we're
12 looking at judicial solutions because we're
13 looking at a judicial problem. The question
14 is the scope of the remedy, what's the
15 appropriate scope. It's always connected to
16 other things. I think that's where we've been
17 training our angle today.

18 MR. MORRISON: Surely an
19 administration could take the position that
20 except in absolute emergencies, which of
21 course they would have the ability to find, we
22 will not have a rule going -- anything go into
23 effect for 90 days or 180 days. That would
24 alleviate some of these problems. Most
25 administrations would not want to do that.

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2 And so self-regulation may not be the answer
3 in that particular situation.

4 But the APA now requires 90
5 days -- 60 -- 30 days, 30 days. Some agencies
6 have 60-day rule statutes as well. Except, of
7 course, where good cause is shown, in which
8 case they can put it into effect sooner and so
9 forth and so on. So it's very hard to close
10 those loopholes.

11 AUDIENCE MEMBER: I'm a law
12 student at American University. My name is
13 Tom Parker. I think I agree with Judge
14 Williams specifically in that the
15 politicization of the courts is an underlying
16 issue here. But I guess my question is more
17 towards if we're talking about not having
18 nationwide injunctions or not limiting the
19 issue to only the parties, what about the
20 government? Should they be able to argue
21 wildly different reasoning for the same
22 regulation in two different courts and trying
23 to get different results? Because I think
24 that's been the case in more than one
25 situation.

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2 MS. WILLIAMS: I'm not aware where
3 the government is arguing different reasoning
4 in different courts. I think we're seeing
5 some different results in different courts.
6 But I think the government's positions have
7 been generally uniform.

8 MR. MORRISON: Or if they're not
9 they're at least arguing uniform. Changes
10 overtime.

11 MS. WILLIAMS: Yes, it changes
12 over time, but in the same issue like in the
13 same country.

14 MR. MORRISON: Sometimes it gets
15 refined, but it's not been inconsistent.

16 AUDIENCE MEMBER: I'm from the
17 Center of Reproductive Rights. I'm using the
18 term "nationwide injunctions" as shorthand for
19 nationwide relief. People have touched on the
20 issue of -- to me that's different in kind, if
21 not in fact. I'm particularly interested in
22 knowing if that is to be a base position,
23 because I didn't understand that to be the
24 position.

25 MS. WILLIAMS: Due disposition has

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2 been consistent across the administrations,
3 which is that not all nationwide injunctions
4 are lawful, but lawful nationwide injunctions
5 are the ones that give relief beyond the
6 parties to the case where that relief is not
7 necessary to give conclusional relief to the
8 actual parties.

9 AUDIENCE MEMBER: So does that
10 mean that that would include the final
11 judgment? Because like that is something a
12 little different, right, as opposed to what
13 we've been talking about today. The cases
14 we've been talking about have basically been
15 preliminary injunctions. Whereas if you have
16 a final judgment is the rule then not be
17 appropriate in that decision?

18 MS. WILLIAMS: So it depends. It
19 kind of depends on the case. And, but I think
20 that the position is the same with regard to
21 both preliminary and permanent injunctions.
22 If the relief is broader than necessary to
23 actually give relief to that plaintiff, then
24 it's not appropriate and we argue unlawful.

25 MR. MORRISON: Could I press you

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2 on that a little bit and ask you for an
3 example of relief that we use the word
4 necessary for the plaintiff. Do you have any
5 injunctions that are broader than appears to
6 this plaintiff that would be necessary?

7 For example, the initial travel
8 ban, let's take the initial travel ban, let's
9 forget about the merits for a second. The
10 decision that was ultimately upheld by the
11 Supreme Court five to four was I believe the
12 third version of the travel ban. But the
13 first version of the travel ban prevented
14 people from coming into let's just say Hawaii
15 or the state of Washington. Am I right,
16 David, on that?

17 MR. HAUSMAN: Yes.

18 MR. MORRISON: And people could
19 come anyplace from around the world to get
20 there. Would a nationwide injunction in that
21 situation to protect the plaintiff, assuming
22 the plaintiff is correct on the merits, would
23 that be reasonably necessary in view of the
24 Department of Justice or not?

25 MS. WILLIAMS: I don't want to get

1 PROCEEDINGS

2 into, you know, specific cases or
3 hypotheticals like that.

4 MR. MORRISON: I suspected that.

5 I wasn't going to stop you from trying.

6 MS. WILLIAMS: I think the example

7 I gave before is appropriate. You can

8 imagine, you can't just give relief to that

9 one student.

10 MR. MORRISON: That's Little Rock,

11 Arkansas. That's not the whole United States.

12 MS. WILLIAMS: But I mean what's

13 necessary to give relief to that student.

14 That's the question. And when the Supreme

15 Court decided that case, that in effect gives

16 nationwide relief.

17 MR. MORRISON: Didn't the Court,

18 when Cooper v. Barrett came up two years

19 later, Arkansas took the position they were

20 not bound, the governor of Arkansas took the

21 position he wasn't bound and there was no

22 injunction against him. The Supreme Court

23 ended up saying no, they can't do that. But

24 it took a while.

25 MR. LEVIN: What I was trying to

1 PROCEEDINGS

2 say, in very strong --

3 MR. MORRISON: Yes. Other

4 solutions, David?

5 MR. HAUSMAN: I'm just happy to

6 jump in. In that case a nationwide injunction

7 was absolutely necessary. In addition, I

8 think it's worth just noticing that when the

9 travel -- when the second version of the

10 Muslim ban reached the Supreme Court, the

11 Supreme Court stayed the injunction in part

12 but did not alter its geographic reach. So in

13 that decision the Supreme Court practically

14 approved the nationwide injunction that had

15 been issued.

16 MR. MORRISON: I see we're just

17 about out of time. Any final comments? Can

18 we go down the panel? Anything else you want

19 to add that we cut you off from?

20 MS. ALI KHAN: No. I think this

21 is just a great discussion. I think it shows

22 that we are all awaiting what the Supreme

23 Court has to say.

24 MR. MORRISON: Ron?

25 MR. CASS: That will be drafted in

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2 different versions. I think we've identified
3 the fact that it's a complicated issue to
4 which there's no easy solution. And we should
5 have more panels.

6 MS. HAMMOND: I actually want to
7 endorse Ronald Levin's point about having
8 thoroughly used the judicial means that are
9 transparent about the factors considered. I
10 think that that alleviates some of our
11 pre-concerns and also perhaps develop some --

12 MR. MORRISON: Talking about on
13 stay of motion, motions for stay in
14 particular?

15 MS. HAMMOND: In considering
16 whether to grant the nationwide injunction.

17 MR. HAUSMAN: I just wanted to
18 call attention to what Ms. Hammond said in the
19 beginning which is that courts could actually
20 consider that finally some of the forum
21 shopping issues in the sense that a court
22 deciding the fourth case against a given rule
23 might weigh that fact in deciding whether to
24 issue an injunction.

25 MR. MORRISON: It doesn't help the

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2 first court.

3 MR. HAUSMAN: That's right.

4 MR. LEVIN: So I'm just casually
5 wondering if there's anything that the
6 Administrative Conference to the United States
7 could do by way of setting forth a framework
8 work for analyzing this. It's a premature
9 question, but just a thought that might bear
10 some reflection.

11 MR. WIENER: I'll say a word about
12 that before we close.

13 MS. WILLIAMS: I just want to echo
14 the other panelists. I always enjoyed these
15 discussions, and I think everybody can agree
16 on more thorough, well-reasoned and
17 transparent discussions.

18 MR. MORRISON: We agree on
19 procedure, not on substance.

20 JUDGE WILLIAMS: I just, it was a
21 bit of a suggestion, a number of points that
22 this whole situation arises out of an
23 administration acting at the edge of its
24 powers. Of course, that depends on how
25 broadly power is granted by Congress as has

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2 been defined by Congress.

3 And as far as I know, only one
4 person in this room is working on doctrinal
5 change to limit that: our chairman, Alan,
6 and it will be interesting to see if you
7 succeed.

8 MR. MORRISON: Thank you. So let
9 me thank you for your participation and give
10 it back to Matt.

11 MR. WIENER: Thank you very much.
12 I think we may -- one observation I have after
13 listening to this, I think we may need, as
14 other commentators pointed out, another term
15 for national injunction. We've placed a
16 number of different considerations.

17 Secondly in response to the
18 question I think that you had answered, Beth,
19 correct me if I'm wrong, but in the garden
20 variety pre-enforcement challenge on the
21 grounds that say a rule is arbitrary and
22 capricious. Nobody is seeking a natural
23 injunction, and that's not the disposition
24 that's set forth in the case.

25 I think you can consider the

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2 disposition would be to vacate the rule and to
3 remand to the agency for further proceedings
4 with, consistent with the opinion. Recognize
5 that sometimes a vacate is not appropriate, as
6 Ron has pointed out. These cases are not
7 tasked in terms of national injunctions.

8 Finally in response to Ron's
9 comment whether the Administrative Conference
10 of the United States could play a role here,
11 my answer is as follows: I think we can -- I
12 think we should seriously consider whether the
13 conference might make a statement that
14 identifies some relevant sphere of
15 considerations for the courts, though we
16 generally do not make the final recommendation
17 to the federal courts. Most of the
18 recommendations directed to the courts are
19 directed at the judicial conference of the
20 United States in its rule-making capacity.

21 That said, we also have made
22 numerous recommendations in the past to
23 Congress about judicial review, and, in fact,
24 some of those recommendations have been
25 implemented. The conference has issued

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2 numerous recommendations on the choice between
3 review in district courts versus Courts of
4 Appeals and when it's appropriate for rules in
5 particular to be reviewed in the Courts of
6 Appeals as opposed to the district courts and
7 in some cases exclusively before the D.C.
8 Circuit. And that leads me to my final
9 comment.

10 The Administrative Conference is
11 undertaking a project now in which we are
12 reviewing every judicial review provision
13 governing the review of adjudicative orders
14 administrative rules in the United States
15 Code.

16 The conference staff spent many
17 months going through the U.S. Code and
18 identified as best we could all relevant
19 provisions. We now turn that database of
20 information over to John Siegel of the George
21 Washington Law School, who also happens to be
22 an ACUS member, and John is going to try to
23 synthesize some of that information and put
24 together for us a guide to judicial review,
25 which will be -- everybody's welcome to read

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2 it, but to a large extent will be directed to
3 Congress. And it will address such matters as
4 when and under what circumstances Congress
5 might wish to vet the review of agency actions
6 in the Courts of Appeals as opposed to
7 district courts and among Courts of Appeals in
8 particular circuits, and the D.C. Circuit
9 obviously is important in that conversation.
10 So that guide is forthcoming. I think we will
11 certainly see it before year's end. And I
12 hope that it will provide some useful and
13 powerful information as we and Congress think
14 about the questions that we've addressed this
15 morning.

16 Lastly, one of our members, Adam
17 White, he directs the Gray Center at George
18 Mason University, literally just posted on the
19 Yale Journal, Yale Journal of Regulation
20 website, its blog, the Notice and Comment, a
21 proposal, I think he put it up last night or
22 first thing this morning, and he's
23 proposing -- he's proposing a lottery system
24 by which if you have multiple cases filed in
25 district courts involving the same subject

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2 matter that the MDL panel would assign it by
3 lottery to a particular district.

4 I don't know that I -- I don't
5 know if that would command any agreement, but
6 it's an interesting piece that I call to your
7 attention.

8 And with that, I'd like to thank
9 all of our panelists for giving their scarce
10 time to us this morning. And especially for
11 everyone in the audience here for giving their
12 time and coming out this morning and listening
13 to this important debate, which will continue
14 in many forums, concluding at the
15 administrative conference. Thank you.

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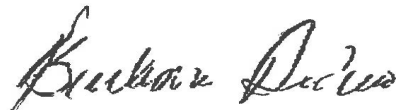
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NATIONWIDE INJUNCTIONS
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I, BARBARA DeVICO, a Notary Public within and
for the District of Columbia, do hereby certify:

I further certify that I am not related to
any of the parties to this action by blood or
marriage; and that I am in no way interested in the
outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my
hand this 25th of February, 2020.



BARBARA DeVICO